

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

DELANO FARMS COMPANY, a  
Washington corporation; THE  
SUSAN NEILL COMPANY, a sole  
proprietorship of Susan  
Neill; and LUCAS BROS.  
PARTNERSHIP, a California  
Partnerships,

Plaintiffs,

vs.

THE CALIFORNIA TABLE GRAPE  
COMMISSION,

Defendant.

No. CV-F-96-6053 OWW/DLB

MEMORANDUM DECISION GRANTING  
IN PART AND DENYING IN PART  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT (Doc. 289)  
AND GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT (Docs. 311 & 312)

Plaintiffs Delano Farms Company, Susan Neill Company, and  
Lucas Bros. Partnership (hereinafter referred to as Plaintiffs)  
have filed a motion for partial summary judgment and/or summary  
adjudication of issues: (1) regarding the "government speech"  
defense; (2) whether *Glickman v. Wileman Brothers & Elliott, Inc.*  
or *United Foods, Inc. v. United States* applies; and (3) whether

1 *Central Hudson* intermediate scrutiny is not applicable."  
2 Defendant California Table Grape Commission (hereinafter referred  
3 to as the Commission) has filed a cross-motion for summary  
4 judgment on the grounds that (1) requiring Plaintiffs to fund the  
5 government speech of the Commission does not implicate the First  
6 Amendment; (2) the Ketchum Act is constitutional under *Abood's*  
7 "germaneness" test; (3) the Ketchum Act is constitutional under  
8 intermediate scrutiny; and (4) Plaintiff's First Amendment rights  
9 are not implicated by compelled funding of most of the  
10 Commission's activities.

11 A. PROCEDURAL BACKGROUND.

12 Plaintiffs commenced this action in the fall of 1996 by  
13 bringing two separate complaints against the Commission,  
14 alleging, *inter alia*, that the Commission's regulation and the  
15 statute establishing the Commission - the Ketchum Act, California  
16 Food & Agric. Code §§ 65500 *et seq.* (the Act) - violate  
17 Plaintiffs' rights under the First and Fourteenth Amendments to  
18 the United States Constitution and their civil rights under 42  
19 U.S.C. § 1983.<sup>1</sup> Plaintiffs initially sought preliminary  
20 injunctive relief to permit them to pay the disputed assessments  
21 into escrow, and in November 1996 and March 1997, the Court  
22 issued two preliminary injunctions granting that relief.

23 In June 1997, the United States Supreme Court decided  
24 *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457

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25 <sup>1</sup>The other case was No. CV-F-96-6198 OWW/DLB and was  
26 consolidated with this case.

1 (1997), reversing the Court of Appeal's decision that reversed  
2 the trial court's grant of summary judgment for defendant against  
3 the Plaintiff growers who were challenging a generic advertising  
4 program for tree fruit under the Agricultural Marketing Agreement  
5 Act (AMAA) on First Amendment grounds. The Supreme Court held  
6 that because the generic advertising program was germane to a  
7 broader regulatory scheme and did not involve the funding of  
8 ideological activities, *id.* at 473, it should be reviewed "under  
9 the standard appropriate for the review of economic regulation"  
10 rather than "under a heightened standard appropriate for the  
11 review of First Amendment issues," *id.* at 469.

12 In light of *Glickman*, the Commission sought dismissal of  
13 Plaintiffs' complaints under Rule 12(b)(6), Federal Rules of  
14 Civil Procedure. In September 1997, Plaintiffs' First Amendment  
15 claim was dismissed to the extent that it alleged that the  
16 Commission's program as a whole, as opposed to particular acts in  
17 administering the program, violated Plaintiffs' rights. (Doc.  
18 96). The preliminary injunctions were modified to require  
19 Plaintiffs pay 98% of the disputed assessments to the Commission  
20 and to pay only 2% into escrow.

21 In 1999, the Court of Appeals for the Sixth Circuit decided  
22 *United Foods, Inc. v. United States*, 197 F.3d 221 (6<sup>th</sup> Cir.1999),  
23 reversing a grant of summary judgment for the United States. The  
24 Sixth Circuit distinguished *Glickman* and held that a generic  
25 mushroom advertising program was subject to First Amendment  
26 scrutiny. *Id.* at 224-225.

1 In light of the Sixth Circuit's decision in *United Foods*,  
2 and contemporaneous Ninth Circuit authority, Plaintiffs moved for  
3 reconsideration of the dismissal order. In June 2000, the Court  
4 denied Plaintiffs' motion for reconsideration, relying on the  
5 Ninth Circuit's recent decisions in *Gallo Cattle Co. v.*  
6 *California Milk Advisory Board*, 185 F.3d 969 (9<sup>th</sup> Cir.1999), and  
7 *Cal-Almond Inc. v. U.S. Department of Agriculture*, 192 F.3d 1272  
8 (9<sup>th</sup> Cir.1999), *cert. denied*, 530 U.S. 1213 (2000),  
9 distinguishing the Commission's table grape program from the  
10 mushroom program at issue in *United Foods*. (Doc. 125). On  
11 August 14, 2000, the parties stipulated to dismiss all remaining  
12 causes of action with prejudice except Plaintiffs' cause of  
13 action under the First and Fourteenth Amendments and 42 U.S.C. §  
14 1983, which the parties and the Court agreed could proceed to  
15 appeal. Plaintiffs then appealed to the Ninth Circuit.

16 After briefing in the Ninth Circuit but before any oral  
17 arguments or decision, the Supreme Court affirmed the Sixth  
18 Circuit's decision in *United Foods*. *United Foods, Inc. v. United*  
19 *States*, 533 U.S. 405 (2001). The Supreme Court held that the  
20 challenged mushroom advertising program was distinguishable from  
21 the tree fruit advertising program in *Glickman*.

22 On January 27, 2003, the Ninth Circuit reversed the  
23 dismissal of Plaintiffs' claims in this case. *Delano Farms Co.*  
24 *v. California Table Grape Commission*, 318 F.3d 895 (9<sup>th</sup>  
25 Cir.2003).

26 Thereafter, the Commission amended its Answer and Plaintiffs

1 filed a motion for judgment on the pleadings. By Order filed on  
2 December 11, 2003, Plaintiffs' motion for judgment on the  
3 pleadings was denied. (Doc. 260).

4 The Scheduling Conference Order summarizes the parties'  
5 factual and legal contentions. Only the First Cause of Action  
6 remains. It alleges that the Ketchum Act violates Plaintiffs'  
7 free speech and association rights under the First and Fourteenth  
8 Amendments and Section 1983. Plaintiffs seek declaratory and  
9 injunctive relief and a refund of their assessments. They  
10 further contend that the Ninth Circuit's decision in this case is  
11 dispositive and that each of the Commission's affirmative  
12 defenses lack legal and factual merit. The Commission contends  
13 that it has not violated Plaintiffs' constitutional rights; that  
14 the advertisements at issue are government speech and therefore  
15 not subject to First Amendment restrictions; or that the program  
16 is part of a comprehensive regulatory scheme and therefore exempt  
17 from First Amendment scrutiny; or, to the extent that its program  
18 is or implicates speech, the program passes scrutiny under  
19 *Central Hudson Gas & Electric Corp. v. Public Service Commission*  
20 *of New York*, 447 U.S. 557 (1980) and/or *Abood v. Detroit Board of*  
21 *Education*, 431 U.S. 209 (1977). The Commission further maintains  
22 that the Ketchum Act is severable, and that if any section,  
23 clause, or part of the Act, or any part of the Commission's  
24 activities, is held unconstitutional, such holding does not  
25 affect the remaining portions of the Act or any part of the  
26 Commission's activities. The Commission raises a number of

1 affirmative defenses to defeat Plaintiffs' claims, in whole or in  
2 part, including that Plaintiffs are guilty of unclean hands; they  
3 have waived any rights regarding any alleged acts or omissions by  
4 the Commission; they are estopped from asserting any rights for  
5 alleged acts or omissions by the Commission; their claims are  
6 barred by the applicable statute of limitations; their claims are  
7 barred by the doctrine of laches; they have not been damaged;  
8 their assessments have not been spent for non-germane,  
9 ideological or political speech; and that Plaintiffs would be  
10 unjustly enriched if they are not assessed for the Commission's  
11 programs but continue to benefit from them.

12 B. STANDARDS GOVERNING RESOLUTION OF SUMMARY JUDGMENT OR  
13 SUMMARY ADJUDICATION MOTIONS.

14 Summary judgment is proper when it is shown that there  
15 exists "no genuine issue as to any material fact and that the  
16 moving party is entitled to judgment as a matter of law."  
17 Fed.R.Civ.P. 56. A fact is "material" if it is relevant to an  
18 element of a claim or a defense, the existence of which may  
19 affect the outcome of the suit. *T.W. Elec. Serv., Inc. v.*  
20 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9<sup>th</sup>  
21 Cir.1987). Materiality is determined by the substantive law  
22 governing a claim or a defense. *Id.* The evidence and all  
23 inferences drawn from it must be construed in the light most  
24 favorable to the nonmoving party. *Id.*

25 The initial burden in a motion for summary judgment is on  
26 the moving party. The moving party satisfies this initial burden

1 by identifying the parts of the materials on file it believes  
2 demonstrate an "absence of evidence to support the non-moving  
3 party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325  
4 (1986). The burden then shifts to the nonmoving party to defeat  
5 summary judgment. *T.W. Elec.*, 809 F.2d at 630. The nonmoving  
6 party "may not rely on the mere allegations in the pleadings in  
7 order to preclude summary judgment," but must set forth by  
8 affidavit or other appropriate evidence "specific facts showing  
9 there is a genuine issue for trial." *Id.* The nonmoving party  
10 may not simply state that it will discredit the moving party's  
11 evidence at trial; it must produce at least some "significant  
12 probative evidence tending to support the complaint." *Id.* The  
13 question to be resolved is not whether the "evidence unmistakably  
14 favors one side or the other, but whether a fair-minded jury  
15 could return a verdict for the plaintiff on the evidence  
16 presented." *United States ex rel. Anderson v. N. Telecom, Inc.*,  
17 52 F.3d 810, 815 (9<sup>th</sup> Cir.1995). This requires more than the  
18 "mere existence of a scintilla of evidence in support of the  
19 plaintiff's position"; there must be "evidence on which the jury  
20 could reasonably find for the plaintiff." *Id.* The more  
21 implausible the claim or defense asserted by the nonmoving party,  
22 the more persuasive its evidence must be to avoid summary  
23 judgment." *Id.* As explained in *Nissan Fire & Marine Ins. Co. v.*  
24 *Fritz Companies*, 210 F.3d 1099, 1102-1103 (9<sup>th</sup> Cir.2000):

25       The vocabulary used for discussing summary  
26       judgments is somewhat abstract. Because  
      either a plaintiff or a defendant can move

1 for summary judgment, we customarily refer to  
2 the moving and nonmoving party rather than to  
3 plaintiff and defendant. Further, because  
4 either plaintiff or defendant can have the  
5 ultimate burden of persuasion at trial, we  
6 refer to the party with and without the  
7 ultimate burden of persuasion at trial rather  
8 than to plaintiff and defendant. Finally, we  
9 distinguish among the initial burden of  
10 production and two kinds of ultimate burdens  
11 of persuasion: The initial burden of  
12 production refers to the burden of producing  
13 evidence, or showing the absence of evidence,  
14 on the motion for summary judgment; the  
15 ultimate burden of persuasion can refer  
16 either to the burden of persuasion on the  
17 motion or to the burden of persuasion at  
18 trial.

19 A moving party without the ultimate burden of  
20 persuasion at trial - usually, but not  
21 always, a defendant - has both the initial  
22 burden of production and the ultimate burden  
23 of persuasion on a motion for summary  
24 judgment ... In order to carry its burden of  
25 production, the moving party must either  
26 produce evidence negating an essential  
element of the nonmoving party's claim or  
defense or show that the nonmoving party does  
not have enough evidence of an essential  
element to carry its ultimate burden of  
persuasion at trial ... In order to carry its  
ultimate burden of persuasion on the motion,  
the moving party must persuade the court that  
there is no genuine issue of material fact  
....

If a moving party fails to carry its initial  
burden of production, the nonmoving party has  
no obligation to produce anything, even if  
the nonmoving party would have the ultimate  
burden of persuasion at trial ... In such a  
case, the nonmoving party may defeat the  
motion for summary judgment without producing  
anything ... If, however, a moving party  
carries its burden of production, the  
nonmoving party must produce evidence to  
support its claim or defense ... If the  
nonmoving party fails to produce enough  
evidence to create a genuine issue of  
material fact, the moving party wins the



1 motion for summary judgment ... But if the  
2 nonmoving party produces enough evidence to  
3 create a genuine issue of material fact, the  
4 nonmoving party defeats the motion.

5 1. BURDEN OF PROOF.

6 Plaintiffs assert the following contentions regarding the  
7 respective burdens of proof in connection with these motions:

8 Since the [Supreme] Court made clear in  
9 *United Foods* and *Johanns*, that it is  
10 Defendant's burden of proof re 'government  
11 speech,' the Table Grape Commission must  
12 persuade this Court, through undisputed  
13 material facts that the Table Grape  
14 Commission law and its operations are  
15 government speech ... Further, Plaintiffs, as  
16 the moving party with respect to this motion,  
17 carry their initial burden of summary  
18 judgment by 'showing' that the Table Grape  
19 Commission lacks sufficient evidence to carry  
20 its ultimate burden of persuasion at trial  
21 with respect to not only the government  
22 speech affirmative defense, but that  
23 *Glickman*, not *United Foods* applies. That is  
24 because those are affirmative defenses.

25 The Commission argues that Plaintiffs are wrong about which  
26 party has the burden of proving that the Commission's speech is  
government speech and that the table grape industry is  
collectivized:

... *Wileman Bros. and Livestock Marketing*  
make clear that the First Amendment is *not*  
*even implicated* if the table grape industry  
is collectivized or if the speech of the  
Commission is government speech. In order to  
make a First Amendment claim, Plaintiffs must  
show that the First Amendment is at least  
implicated by the challenged speech, and it  
is therefore *Plaintiffs'* burden to  
demonstrate that the table grape industry is  
not collectivized and that the speech of the  
Commission is not government speech.

Noting that Rule 8(c), Federal Rules of Civil Procedure lists

1 specific affirmative defenses, including "any other matter  
2 constituting an avoidance or affirmative defense", the Commission  
3 cites *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080,  
4 1088 (9<sup>th</sup> Cir.2002):

5 A defense which demonstrates that plaintiff  
6 has not met its burden of proof is not an  
7 affirmative defense. See *Flav-O-Rich v.*  
8 *Rawson Food Services, Inc. (In re Rawson Food*  
9 *Services, Inc.)*, 846 F.2d 1343, 1349 (11<sup>th</sup>  
10 Cir.1988) (recognizing that a defense which  
11 points out a defect in the plaintiff's prima  
12 facie case is not an affirmative defense).

13 The Commission correctly asserts the burden of proof is on  
14 Plaintiffs. Plaintiffs have the burden to prove that the  
15 Commission's program pursuant to the Ketchum Act is subject to  
16 the First Amendment and that the program violates the First  
17 Amendment.

18 C. STATEMENTS OF UNDISPUTED FACTS.

19 The parties' Undisputed Stipulated Facts are 63 pages long  
20 and include 170 separately numbered paragraphs containing a  
21 multitude of facts.

22 The Commission's Statement of Undisputed Facts is 83 pages  
23 long, is comprised of 235 facts (with numerous subparts) and has  
24 a table of contents. Plaintiffs' Objections and Response to the  
25 Commission's Statement of Undisputed Facts is 137 pages long, and  
26 uses the following abbreviated keys: "'Stip.'" stands for  
stipulated; 'Undis.' stands for undisputed; 'Disp.' stands for  
disputed; 'Obj.' stands for objection; and 'Rel.' stands for not  
relevant." In addition, Plaintiffs assert:

1 When Plaintiffs ... respond with an  
2 undisputed, it is only for the purposes of  
3 the instant cross-motions for summary  
4 judgment, and Plaintiffs reserve the right,  
5 at trial, or any further additional motions  
6 for summary judgment to dispute the same  
7 alleged fact, or to object, or object on  
other or additional grounds. In addition,  
when Plaintiffs and Defendant stipulated to  
various facts, it was done on the condition  
that any fact 'stipulated' to could be  
explained, expounded upon, or state how  
things were different or have changed.

8 Also, to the greater extent, Plaintiffs' objections to or  
9 disputes with the Commission's Statement of Undisputed Facts are  
10 string-cite objections, i.e., not relevant, hearsay, lack of  
11 foundation, improper lay opinion, conclusory, violation of best  
12 evidence rule, with no supporting law or analysis.

13 Plaintiff's Statement of Undisputed Facts is 8 pages long  
14 and is comprised of 43 facts.

15 Because of the magnitude of the factual positions of the  
16 parties, in the interests of economy, a separate Statement of  
17 Undisputed Facts will not be provided, instead the relevant  
18 undisputed facts and certain disputed facts necessary to ruling  
19 on the motions will be included in this Memorandum Decision.

20 D. UNDISPUTED STIPULATED FACTS.

21 1. California has the largest agricultural production of any  
22 state in the nation.

23 2. The California Department of Food and Agriculture  
24 ("CDFA") estimated that in 2004, California's growers produced  
25 almost \$32 billion in agricultural commodities, valued at the  
26 farm-level.

1        3. Of that figure, grape growers as a whole, including wine,  
2 raisin, and table type grapes, accounted for 8.6%.

3        4. The volume of California table grapes shipped has  
4 increased from the equivalent of approximately 37 million 19-  
5 pound boxes of grapes per year when the Commission was first  
6 created to approximately 94 million 19-pound boxes in 2005.

7        5. Approximately 97% - 99% of the table grapes grown in the  
8 United States are grown in California.

9        6. The total F.O.B. value (value at the point of shipping  
10 including picking, packing, and extra services such as cold  
11 storage and placing on pallets, as voluntarily reported to the  
12 United States Department of Agriculture ("USDA")) of the  
13 California table grapes shipped to buyers  
14 in 2004 was just over \$1 billion.

15        7. Table grapes are grown in California in the Coachella and  
16 San Joaquin valleys on approximately 110,000 acres of land.

17        8. According to the United States Department of Agriculture,  
18 farm and farm-related employment accounted for 2.75 million jobs  
19 in California in 2002—over 13.8 % of the state's total  
20 employment.

21        9. In sum, agriculture and the table grape industry are  
22 important parts of the California economy.

23        10. At present, there are 35 active federal regional  
24 marketing orders in place and 17 national programs that cover  
25 blueberries, beef, cotton, dairy, eggs, milk, Hass avocados,  
26 honey, lamb, mangoes, mushrooms, peanuts, popcorn, pork,

1 potatoes, soybeans, and watermelons.

2 11. In addition to the federal marketing orders covering the  
3 state, California currently has 53 active commodity marketing  
4 programs. These programs cover about 65% of the value of  
5 California's agricultural production, and include programs for  
6 four of California's top five agricultural products (dairy  
7 products, greenhouse/nursery products, grapes, almonds, and  
8 cattle/calves).

9 12. The California Table Grape Commission was established in  
10 1967 by an act of the California Legislature called the Ketchum  
11 Act. Its purposes include expanding and maintaining demand for  
12 California table grapes worldwide and preventing economic waste  
13 of the agricultural wealth of the State of California. The  
14 California Legislature has also declared that the Commission's  
15 activities (and those of other commissions) are essential to the  
16 goals and interests of the State of California in, among other  
17 things, marketing research and trend analysis, elimination of  
18 tariff and non-tariff barriers, consumer education relating to  
19 the health and other benefits of consuming agricultural products,  
20 and "[c]ooperative crisis resolution."

21 13. The Commission is comprised of 18 commissioners  
22 representing the six active table grape growing districts in the  
23 State of California and one "public member," all of whom are  
24 appointed and subject to removal by the Secretary of the  
25 California Department of Food and Agriculture ("CDFA"). Prior to  
26 appointment, the CDFA inquires into whether potential

1 commissioners are suitable for appointment.

2       14. The Commission's work is funded primarily through  
3 assessments that are imposed on all shipments of California table  
4 grapes pursuant to the Ketchum Act. Those assessments are  
5 paid to the Commission by shippers who are authorized to collect  
6 the assessments from the grower of the fruit shipped.

7       15. The Commission office is located in Fresno, California,  
8 where it employs 17 people. It has one employee in Texas. In  
9 addition, the Commission contracts for the services of a number  
10 of consultants, including one domestic representative who works  
11 out of Canada and international representatives in Australia, New  
12 Zealand, the United Kingdom, Germany, Japan, South Korea, Hong  
13 Kong, Singapore, India, Venezuela, Costa Rica, Mexico, the  
14 Philippines, Taiwan, and the United Arab Emirates.

15       16. The Commission's fiscal year runs from May 1 to April  
16 30. The 2004-2005 fiscal year therefore closed on April 30, 2005.  
17 The Commission's expenditures for the 2004-2005 fiscal  
18 year were \$12,015,653. Its adjusted carryover and revenue was  
19 \$12,497,031. Assessments paid to the Commission (and not into an  
20 escrow account) for California table grapes shipped  
21 in 2004-2005 accounted for \$8,367,429 of that amount. The  
22 remaining revenues came principally from federal international  
23 marketing grants.

24       17. The season for California table grapes runs from May  
25 through January. In the early part of the season, retailers  
26 purchase grapes grown in the Coachella Valley of California.

1 During this early part of the California season, late season and  
2 storage table grapes from Chile and South Africa are still in the  
3 market and new crop grapes from Mexico have entered the  
4 market. As the season progresses, California table grapes from  
5 the Bakersfield area and then farther north are available. By the  
6 middle of July, usually only California table grapes are in  
7 the domestic market. By November, grapes from a number of  
8 southern hemisphere countries (including Brazil, Peru, and Chile)  
9 are back in the market.

10 18. There are at least four different principal paths for  
11 California table grapes to travel from the vineyard to the final  
12 end retail consumer in the domestic market.

13 19. All four principal paths start with a grower who  
14 harvests the table grapes and a shipper who packs the grapes and  
15 finds a first buyer for them. Sometimes growers act as their own  
16 shippers. Other times growers contract with a separate entity to  
17 act as the shipper.

18 20. All four principal paths end with a retailer making a  
19 sale to a customer. While there are different kinds of retailers  
20 (large supermarket chains, mom-and-pop grocery stores, fruit  
21 stands, farmers' markets etc.), the vast majority of grapes are  
22 sold by large retail chains such as Safeway, Albertson's, Kroger,  
23 or Wal-Mart.

24 21. The distinction between the four principal paths is in  
25 how the grapes go from the grower/shipper to the retailer.

26 a. The first path is directly from shipper to retailer.

1 For large retailers, such as Vons, this is the most common way to  
2 purchase grapes. Approximately 70% of all California grapes sold  
3 in the United States travel along this path.

4 b. The second path is from shipper to a broker and then  
5 to a retailer. The broker may or may not take ownership or  
6 physical custody of the grapes. Approximately 10% of all  
7 California grapes sold in the United States travel along this  
8 path.

9 c. The third path is from shipper to a distributor and  
10 then from the distributor to the retailer. The distributor may  
11 take physical possession of the grapes and generally  
12 takes ownership of the grapes. Approximately 10% of all  
13 California grapes sold in the United States travel along this  
14 path.

15 d. Finally, the fourth path is from shipper to  
16 "terminal market wholesalers." As the name suggests, these  
17 wholesalers operate in so-called "terminal markets"—generally  
18 large cities where a large volume of grapes is sold. Terminal  
19 market wholesalers take physical possession of the grapes and  
20 most often take ownership of them. Approximately 10% of all  
21 California grapes sold in the United States travel along this  
22 path.

23 22. California grapes travel along similar paths to  
24 consumers in international markets.

25 23. Although there are four distinct paths along which  
26 California table grapes generally travel from vineyard to



1 consumer, there are ultimately two distinct markets for  
2 California table grapes. First, there is the market in which  
3 retailers and wholesalers purchase California table  
4 grapes from grower/shippers (the "wholesale market"). Second,  
5 there is the market in which consumers purchase California table  
6 grapes from retailers (the "retail market"). These  
7 markets operate very differently.

8       24. Produce retailers, such as supermarket chains like Vons,  
9 purchase table grapes in the wholesale market, either from  
10 grower/shippers, brokers, distributors, or wholesalers.  
11 Retailers make four principal decisions when participating in the  
12 wholesale market: (1) what quantity of table grapes to put on  
13 their shelves, (2) from which production area (Chile,  
14 Mexico, California) to buy table grapes, (3) from which specific  
15 shippers to buy table grapes, (4) and what price they will pay.  
16 Retailers also consider the color and level of fruit quality  
17 (e.g., "A" box, "B" box, etc.) of the grapes they sell and  
18 whether grapes are seedless.

19       25. In deciding what quantity of table grapes to put on  
20 their shelves and where to put them, retailers must weigh the  
21 value of selling grapes versus the value of selling other  
22 products. Every square foot allocated to table grapes means one  
23 less square foot allocated to something else in the produce  
24 department. And every square foot allocated to produce is one  
25 square foot less available in the store for toothpaste, coffee,  
26 and everything else.

1       26. California table grapes compete with grapes from other  
2 countries (during certain parts of the year) and other fruits  
3 (like apples) for shelf space within the produce department.  
4 California table grapes and other "snack" produce also compete  
5 with "salty snacks," like potato chips and pretzels and with  
6 snacks like candy and ice cream, for overall snack shelf space.

7       27. Competition for shelf space between different types of  
8 produce and among different types of products (produce vs. dairy,  
9 for example) is fierce. There is competition across departments  
10 and within departments. Foods and non-foods compete for space.  
11 Moreover, there is competition for the best shelf space in a  
12 grocery store.

13       28. The goal of individual grower/shippers of table grapes  
14 is to obtain the highest price and maximize their own sales. That  
15 is, individual grower/shippers are interested only in  
16 expanding their slice of the overall table grape market.

17       29. Every year, each grower/shipper has different levels of  
18 fruit quality to sell to his/her customers. A common method of  
19 identifying quality is to designate a box of grapes as an  
20 "AA" box (highest quality), an "A" box, a "B" box, and a "C" box.  
21 Most grower/shippers offer all four levels. It is possible for  
22 different grower/shippers to have more-or less-of  
23 the highest quality fruit than their competitors. A particular  
24 grower/shipper may generally have a higher percentage of the  
25 highest quality fruit than another grower/shipper. But it is  
26 possible for that grower/shipper to suffer from adverse weather

1 patterns in a particular year and thus have less highest quality  
2 fruit than the grower/shipper whose fruit is generally not as  
3 good.

4 30. Consumers do not shop for grapes with brand names in  
5 mind. Rather, table grape consumers consider primarily the  
6 ripeness and freshness (*i.e.*, quality) of the grapes, the taste  
7 of the grapes, the variety and whether the grapes are seeded, and  
8 the price of the grapes.

9 31. Consumer survey evidence indicates that when shoppers  
10 buy produce generally, brand is typically not an important  
11 factor. While for some types of produce, such as bananas and  
12 oranges, brand is more important than it is for grapes, it is  
13 still subordinate to a host of other factors like ripeness and  
14 freshness (*i.e.*, quality), color, and price.

15 32. In large retail stores, grapes are typically not sold in  
16 their boxes, so customers never see the labels on those boxes.  
17 Store signage typically does not indicate the name of the  
18 grower/shipper of the table grapes being displayed. And most of  
19 the time grapes' packaging does not reveal the grower/shipper's  
20 name.

21 a. In general, most retailers do not want the produce  
22 they sell to be branded. They find branding on packaging clutters  
23 their produce section and confuses consumers because of the  
24 different print sizes, colors, and logos fighting for the  
25 consumer's eye. Retailers want the grapes themselves to be the  
26 focus of the consumer's eye. For a product like table

1 grapes—which are produced at different times of the year by  
2 different growers in different parts of the world and are shipped  
3 to market by multiple shippers who each have multiple labels—this  
4 problem of customer confusion is exacerbated. Retailers do not  
5 want to be tied to any one grower/shipper or any one label  
6 because throughout the year a retailer will buy its grapes from a  
7 number of different grower/shippers, both domestic and  
8 international.

9       33. In general, there is less consumer recognition of brands  
10 of produce than other food products.

11       34. Individual California table grape growers and shippers  
12 conduct virtually no direct advertising to consumers in the  
13 retail market.

14       35. To achieve its statutory objective of maintaining and  
15 expanding demand for California table grapes worldwide,  
16 preventing economic waste of the agricultural wealth of the State  
17 of California, and promoting the health of the people of  
18 California, the Commission conducts a variety of activities that  
19 fall into five general categories: (1) Research, (2) Trade  
20 Management, (3) Issues Management, (4) Advertising, and (5)  
21 Education/Outreach.

22       36. The Commission's research activities are broad ranging  
23 and include consumer, trade, viticulture, industry statistical,  
24 and nutrition research.

25       a. In 2004–2005, the Commission spent \$1,776,950 in  
26 assessment dollars on research.

1           37. The Commission's trade management activities focus on  
2 working with the retail and wholesale produce trade, domestically  
3 and internationally, to create demand for the volume  
4 of fresh California grapes grown each season.

5           a. Using the results of its category management  
6 (discussed below) and consumer research, as well as analysis of  
7 retail chain activities (in the aggregate and individually) and  
8 using financial and/or media incentives, the Commission works  
9 around the year to attempt to create demand for California table  
10 grapes.

11           b. In 2004-2005, the Commission spent \$1,987,783 in  
12 assessments on trade management.

13           38. The Commission's issue management work is varied, as the  
14 issues that might impact demand for the crop can vary week-to-  
15 week, month-to-month, and season-to-season.

16           a. Issue management is an important element of all  
17 demand-creation work.

18           b. Fundamentally, the focus of issue management is  
19 working with interested parties and decision makers to keep trade  
20 flowing both in the United States and internationally, and to  
21 respond to short-term incidents and long-term issues that could  
22 impair the economic strength of California's fresh grape  
23 industry.

24           c. Specifically, issue management typically involves  
25 working with other governmental agencies at the county, state,  
26 and federal levels and their counterparts in export markets—as

1 well as with industry groups, health authorities, and non-  
2 industry organizations.

3 d. It involves using a variety of disciplines to ensure  
4 the long-term continued movement of fresh California grapes from  
5 field to market.

6 e. Categories of issue management on which the  
7 Commission works on an ongoing basis include (but are not limited  
8 to) food safety, market access, tariff reduction, standardization  
9 of packaging, labeling, pesticide registration, pest  
10 infestations, and all litigation involving the Commission. Within  
11 each category numerous types of issues can, and do, arise.

12 f. In 2004-2005, the Commission spent \$1,493,192 in  
13 assessment dollars on issue management.

14 39. The Commission conducts advertising campaigns to reach  
15 consumers with paid messages designed to increase overall demand  
16 for fresh California grapes.

17 a. Paid media is used in an attempt to keep fresh  
18 California grapes "top-of-mind" for consumers in a way that  
19 motivates increased purchase.

20 b. The messages revolve around healthy snacking,  
21 positioning grapes as a healthy alternative to products like  
22 buttered popcorn, fries, and ice cream. This message is  
23 intended to increase demand but also furthers the state interest  
24 in public health.

25 c. In 2004-2005, the Commission spent \$2,032,440 in  
26 assessment dollars on paid advertising.

1           40. The Commission's education and outreach activities are  
2 designed to provide education, training, analysis, and general  
3 information to retailers, wholesalers, foodservice operators,  
4 grower/shippers, researchers, consumers, and others such as  
5 teachers, editors, authors, doctors, and nutritionists.

6           a. The Commission provides information about, among  
7 other things, nutrition, usage, storage, handling, availability,  
8 retail merchandising techniques, product characteristics,  
9 technological advances, and statistical analysis through a  
10 variety of outreach methods.

11           b. This work is intended to increase demand. Credible  
12 information is required by those who make decisions about what  
13 products to place on grocery shelves, what nutritional  
14 information to share with patients or clients, what foods to  
15 include in classroom lessons, what foods to include in restaurant  
16 menu items, what to advise readers about recipes or storing and  
17 handling of food, and what to advise viewers to watch for in  
18 terms of quality and safety.

19           c. In 2004-2005, the Commission spent \$847,619 in  
20 assessment dollars on education and outreach.

21           41. The Commission operates five principal ongoing programs:  
22 Viticulture and Technical Issues, Advertising, Domestic  
23 Marketing, International Marketing, and Consumer Education.  
24 Each program involves activities that fall within one or more of  
25 the categories described above in paragraphs 36-40.

26           42. The viticulture and technical issues program has three

1 areas of focus: viticulture research, technical issues  
2 management, and patenting/licensing. The program includes  
3 activities falling within the following categories: research,  
4 issue management, and education and outreach.

5 43. The viticulture research program involves directing and  
6 overseeing the funding and implementation of viticulture research  
7 performed by scientists from a variety of research institutions  
8 including the University of California, USDA, and California  
9 State University. The research is designed to increase grower  
10 efficiency and improve table grape production  
11 and fruit quality.

12 a. The Commission has developed a process for receiving  
13 and evaluating research proposals.

14 b. The program includes the funding of cultural  
15 (horticultural farming) practices research that is intended to  
16 improve fruit maturity, storability, and overall quality. It  
17 includes work in areas such as pruning techniques, trellising/  
18 training methods, crop/cluster and canopy management, crop load  
19 regulation, and irrigation strategies.

20 c. The program also includes the funding of pest and  
21 disease management research. Research studies in this category  
22 attempt to develop biological and reduced-risk chemical control  
23 methods for destructive vineyard pests and diseases such as  
24 mealybugs, molds/mildews and grapevine measles. Biological  
25 control methods being examined include releasing beneficial  
26 insect predators or parasites to reduce the targeted pest



1 population and using pheromones or sex attractants to disrupt  
2 mating cycles. The Commission also funds research regarding the  
3 application of reduced risk pesticides that target harmful pests  
4 without eliminating beneficial insects.

5 d. The program also funds post-harvest research. The  
6 research is intended to improve storing, handling/shipping  
7 procedures, shelf life, and overall fruit quality. It includes  
8 research on modernizing storage room and phytosanitary  
9 fumigations, temperature/humidity requirements, and new packaging  
10 methods.

11 e. Finally, the program funds new grape and grape  
12 rootstock variety research. The goal of this research is the  
13 development and evaluation of new varieties of grapes and  
14 grapes rootstocks with improved characteristics and pest/disease  
15 resistance.

16 i. The Commission has been funding efforts to  
17 breed new, better varieties of table grapes since the inception  
18 of the research program in 1972, first with the University of  
19 California and then with USDA. The Commission currently  
20 supports the USDA's table grape variety breeding program run by  
21 Dr. David Ramming, providing approximately one-third of the  
22 program's funding.

23 ii. Since the Commission began funding the USDA  
24 program and advising its breeder in 1981, it has developed over  
25 10 new varieties of grapes that are currently being marketed,  
26 including the Crimson Seedless variety that constitutes over half

1 of Delano Farms' sales as well as the Princess variety  
2 sold by Delano Farms.

3 f. The Commission makes the results of its viticulture  
4 research available to grower/shippers in a number of ways that  
5 include seminars, field tours, newsletters, and publications.  
6 (The new varieties are made available through the patenting and  
7 licensing program described below.)

8 44. Technical issues management encompasses the Commission's  
9 work related to pesticides, pest exclusion, production,  
10 packaging, distribution, and quarantines. It includes technical  
11 analysis related to the Commission efforts to expand  
12 international market access by, among other things, developing  
13 international shipping protocols and participating in trade  
14 barrier negotiations.

15 a. The Commission monitors chemical Maximum Residue  
16 Level ("MRL") restrictions proposed by other countries or the  
17 international standard-setting body (the Codex Alimentarius  
18 Commission) to determine whether the chemicals to be regulated  
19 are registered for use on grapes in California and are in fact  
20 used, whether the proposed MRL is lower than the U.S. or the  
21 Codex MRLs, and if so whether the proposed MRL is likely to  
22 disrupt shipments of California table grapes to the country in  
23 question. Depending on what is learned, the Commission works  
24 with the U.S. government and the country involved to negotiate  
25 the best possible solution for California's table grape  
26 grower/shippers.

1           b. The Commission also conducts research to support its  
2 efforts to develop and streamline shipping protocols that allow  
3 California table grapes to access foreign markets. The research  
4 can also support efforts to eliminate those protocols when they  
5 are no longer necessary.

6           45. The patenting and licensing program revolves around the  
7 Commission's efforts to develop new varieties of table grapes  
8 jointly with the USDA and to protect the intellectual property  
9 developed through U.S. patents, international plant protection,  
10 and domestic and international licenses.

11           a. In 2001, the Commission and USDA signed a Memorandum  
12 Of Understanding that outlined an agreement to patent future  
13 USDA-developed table grape varieties with the intent that the  
14 Commission will become the exclusive licensee of the varieties in  
15 domestic and international markets.

16           b. In 2004 and 2005, at the recommendation of the  
17 Commission, the USDA sought patent protection for and then  
18 released three newly developed varieties of grapes: Sweet  
19 Scarlet, Scarlet Royal, and Autumn King. The USDA has already  
20 obtained patents for the Sweet Scarlet and Scarlet Royal  
21 varieties, and patent is pending for the Autumn King variety.

22           c. As the exclusive licensee, the Commission, in turn,  
23 has sublicensed the varieties to a number of nurseries that sell  
24 the varieties to any domestic grower that wishes to purchase  
25 them. The amount of domestic production of the newly developed  
26 varieties is not limited. Nurseries that wish to sell the new

1 varieties, however, must pay the Commission a yearly fee and a  
2 per-vine fee, a portion of which is remitted to the USDA.

3 d. The Commission is also charged with applying for  
4 intellectual property protection abroad, setting the terms on  
5 which the new varieties are made available abroad, and enforcing  
6 foreign intellectual property rights obtained.

7 46. In 2004-2005, the Commission's viticulture and  
8 technical issues program spent \$807,377 in assessment dollars on  
9 the following categories of activities \$548,711 on viticulture  
10 research, \$12,370 on outreach, and \$246,296 on issue management.

11 47. Since the Commission began funding the USDA breeding  
12 program, USDA has developed 10 new varieties of grapes that are  
13 currently being marketed and two varieties that are not yet in  
14 production. Together, the 10 varieties being currently marketed  
15 account for approximately 30% of California grape shipments.

16 48. The following varieties were developed under the joint  
17 USDA/Commission program: Autumn Seedless, Autumn Black, Crimson  
18 Seedless, Autumn Royal, Fantasy Seedless, Fresno Seedless, Black  
19 Emerald, Princess, Summer Royal, Sweet Scarlet, Scarlet Royal  
20 (not yet in production) and Autumn King (not yet in production).

21 49. The Commission has also helped to fund the development  
22 of the Red Globe and Christmas Rose varieties. In total,  
23 varieties funded by the Commission account for approximately 45%  
24 of the volume of California table grapes shipped to market, and  
25 California produces approximately 97% - 99% of the commercially  
26 grown table grapes in the United States.

1           50. The Commission's initiative to obtain patent protection  
2 for newly developed varieties has the potential to be beneficial  
3 to the California table grape industry.

4           a. As the exclusive licensee of varieties patented by  
5 the USDA, the Commission attempts to ensure that varieties  
6 developed by California growers are not misappropriated by  
7 foreign growers to unfairly compete with California grapes. The  
8 Commission also attempts to ensure that the genetic quality of  
9 the new varieties is maintained.

10          51. The California Legislature has directed the Commission  
11 to undertake advertising that "promote[s] the sale of fresh  
12 grapes" and the Commission has consistently followed that  
13 legislative directive.

14          52. The consumer advertising undertaken by the Commission  
15 is known as "generic advertising" because it promotes the entire  
16 category of fresh grapes from California. It does not specify  
17 any one type of fresh California grape or any one producer of  
18 fresh California grapes. Instead, it speaks to the general  
19 characteristics of all fresh California grapes—that they are  
20 flavorful, convenient, and healthful.

21          53. All of the Commission's radio, television, print media,  
22 and billboard advertisements are intended to "promote the sale of  
23 fresh grapes." Commission advertisements have not promoted  
24 products other than grapes and have not disparaged other  
25 California agricultural products. The Commission has not run  
26 political or ideological advertisements, and all of the

1 Commission's advertisements have been in good taste and have not  
2 been false or misleading.

3 54. The development of the Commission's advertising  
4 campaign begins with consumer research.

5 a. Initially, secondary research on consumer attitudes  
6 and buying habits is obtained from a variety of sources to  
7 determine the general consumer mindset about the foods  
8 they purchase and consume.

9 b. Next, the Commission conducts primary research to  
10 determine how consumers view grapes, why they do and do not  
11 purchase them, where and when they purchase them, what they look  
12 for when purchasing grapes, how, when and where they consume  
13 them, their specific views of fresh grapes from California as  
14 opposed to grapes from other sources, what foods they might  
15 consume instead of fresh California grapes, and what qualities  
16 about fresh California grapes are most and least motivating for  
17 their purchase and consumption of fresh California grapes.

18 55. The research is then analyzed by the Commission staff  
19 and its advertising agency—currently McCann Erickson, San  
20 Francisco—to develop potential advertising messages to “promote  
21 the sale of fresh grapes” and the most effective medium to  
22 transmit that message. The potential messages are then taken to  
23 additional focus groups to determine their effectiveness  
24 in motivating consumers to purchase and consume more fresh  
25 California grapes.

26 56. The current advertising campaign takes into account the

1 fact that fresh California grapes are consumed primarily as a  
2 snack and emphasizes that fresh California grapes are a more  
3 healthful alternative to other snack food such as ice cream,  
4 french fries, chips, and buttered popcorn.

5 57. The advertising is done primarily in outdoor billboards  
6 and in 10-second traffic radio commercials. The Commission also  
7 ran a limited amount of television advertising in the fall  
8 of 2005 on the Food Network.

9 58. The Commission's outdoor billboards use beautiful  
10 images of grapes contained in packaging typically associated with  
11 less healthful snack foods such as popcorn, potato chips, french  
12 fries, and ice cream to remind consumers that grapes are a  
13 healthy alternative to these other snack foods.

14 a. In 2005, the Commission ran 284 billboards for  
15 seven months. The billboards were placed in the following major  
16 markets: Baltimore, Boston, Chicago, Dallas-Ft. Worth, Denver-  
17 Boulder, Los Angeles, New York, Philadelphia, San Francisco, and  
18 Seattle-Tacoma. On average, there were 18 billboards in each  
19 market.

20 59. The Commission's radio advertisements are in the form  
21 of short radio messages that air during radio traffic reports  
22 when consumers are thought to be paying close attention to what  
23 they hear on the radio. The messages remind consumers where to  
24 go to get the fresh California grapes they enjoy and encourage  
25 consumers, while they are out on the road, to stop into the  
26 featured store and buy grapes. Like the billboards, these

1 advertisements emphasize that California table grapes are a  
2 healthy alternative to other snack foods.

3 a. One script, for example, reads: "Hold the burger,  
4 the fries, and the shake and drive up to (Name of Store) because  
5 the fresh California grapes are in season now. This is  
6 your window to pick up the grapes everyone likes best—at your  
7 local (Name of Store)."

8 b. Another reads: "Have a sweet tooth that won't let  
9 go? Forget the ice cream and head to (Name of Store). Scoop up  
10 a bunch of sweet, fresh California grapes from (Name of Store)  
11 and in a few luscious bites you'll know why California grapes are  
12 preferred over any other."

13 c. Other radio scripts emphasize the health benefits  
14 of table grapes more generally. One reads: "It's easy to get  
15 your recommended five servings of fruits and vegetables a  
16 day with fresh California grapes. They come in three colors and  
17 fresh California grapes from (Name of Store) are part of a smart,  
18 healthy diet. Pick up some sweet, delicious grapes from (Name of  
19 Store) and live better."

20 60. In 2004 and 2005, the Commission ran two 15-second  
21 advertisements on the cable channel the Food Network during the  
22 seven-day-a-week cooking program "Sara's Secrets" featuring  
23 renowned chef Sara Moulton.

24 a. The television advertisements, like the billboards  
25 and radio advertisements, emphasized that grapes are a healthy  
26 alternative to traditional snack foods.



1           b. One advertisement showed three colors of grapes in  
2 an ice cream cone and the other shows grapes in a popcorn bag. A  
3 voiceover declared that "Good Things Come in Bunches."

4           61. Past themes of the Commission's advertising include:  
5 (a) "Good things come in bunches."; (b) "Share some California  
6 grapes."; (c) "Life is complicated. Grapes are simple."; and (d)  
7 "California grapes. The Natural Snack."

8           62. The Commission's advertising is designed to be as  
9 motivating to consumers as possible, but it is also used as an  
10 incentive for retailers.

11           63. The Commission's advertising is meant to work in  
12 conjunction with the Commission's other efforts.

13           a. The Commission's efforts with retailers are  
14 intended to "push" California table grapes into the stores, and  
15 the Commission's advertising is intended to "pull" consumers into  
16 the stores to buy the grapes.

17           b. Similarly, the Commission's advertising is intended  
18 to build on the research efforts of the Commission. The current  
19 advertising campaigns emphasize the health benefits of  
20 table grapes and the Commission's research efforts are focused,  
21 in part, on discovering and documenting the health benefits of  
22 grapes.

23           64. In 2004-2005, the Commission's advertising program  
24 spent \$2,042,247 in assessment dollars on the following  
25 categories of activities: \$229,003 on consumer research and  
26 \$1,813,244 on direct advertising.

1           65. Most of the advertising on television, in print, or on  
2 the radio is "branded product" advertising. Advertising for  
3 "Pepsi" soda, "Tide" laundry detergent, and "Crest" toothpaste  
4 are familiar examples. The goal of this type of advertising is  
5 almost entirely to increase sales of the particular product  
6 advertised, not to increase overall consumption of a category of  
7 product.

8           66. Product differentiation can stem from actual  
9 differences between products—the Microsoft Windows operating  
10 system works differently from the operating systems of its  
11 competitors. Or product differentiation can result from an  
12 extensive advertising campaign that creates perceived differences  
13 between products—some consumers prefer Coke while others prefer  
14 Pepsi, yet the actual differences between the products may be  
15 slight.

16           67. The California table grape industry is estimated to  
17 have 550 growers currently, including grower-shippers. Large  
18 growers have market shares only in the single digits.

19           68. Unlike "branded product" advertising, which often seeks  
20 to create preferences in the minds of consumers even absent  
21 substantial differences in the products sold, generic advertising  
22 often promotes actual characteristics of a category of products.  
23 Table grapes, for example, are promoted for their health  
24 benefits, convenience of consumption, and good taste.

25           69. Generic regional advertising is intended to promote all  
26 table grapes from a particular region, such as California. This

1 advertising is still generic in that it does not distinguish  
2 between different California producers, but it does seek to  
3 distinguish California table grapes from grapes grown in other  
4 regions.

5 70. Generic regional advertising allows producers in a  
6 region who feel they are too small to run their own advertising  
7 to band together and fund efforts to run advertisements focusing  
8 on the general attributes of the category of products.

9 71. Economists have been modeling and measuring the impacts  
10 of commodity programs for at least 20 years.

11 72. The Commission's current advertising campaign  
12 ("Snacks") was designed to target women aged 25 to 54 and to  
13 convey the message that grapes are a healthy alternative to other  
14 snack foods based on market data that revealed that the primary  
15 shoppers in most households are women in that age range and these  
16 women were concerned with providing healthy, tasty, convenient  
17 foods to their families.

18 73. According to consumers in focus group studies, the  
19 Commission's generic "California" advertising campaign motivates  
20 consumers to want to purchase more California table grapes.

21 74. In a focus group study, the "Snacks" campaign was  
22 viewed favorably by participants. All participants readily  
23 discerned the message that grapes are a healthy alternative to  
24 other snack foods.

25 a. Participants described the campaign as "brilliant"  
26 and "clever." People selected the words, "happy," "pleased,"

1 "surprised," "playful," "joyful," "amused," "interested,"  
2 and "delighted" to describe their feelings to this campaign. The  
3 campaign appeals to adults as individuals and as parents. And  
4 the campaign is intended to make consumers think about grapes in  
5 a new way, establishing in their minds more occasions for using  
6 grapes.

7 75. Any additional revenue to farmers that might be  
8 realized due to the Commission's advertising, trade management,  
9 and education and outreach generally results in additional  
10 jobs in the agricultural industry.

11 76. Like other states, California and its citizens face a  
12 number of significant health problems related to poor diets.

13 a. For example, more than half of California adults  
14 are overweight or obese. Physically inactive, obese, and  
15 overweight individuals cost California billions of dollars every  
16 years in medical care, workers' compensation, and lost  
17 productivity.

18 b. Heart disease is the leading cause of death in  
19 California and the nation. In 1999, there were almost 60,000  
20 deaths due to heart disease in California.

21 c. Stroke is the third leading cause of death in  
22 California and the nation. In 1999, there were approximately  
23 18,000 deaths due to stroke in California.

24 d. Cancer is the second leading cause of death in  
25 California and the nation. Cancer accounted for approximately 25%  
26 of all deaths in California in 2002.

1 e. Diabetes is also as significant health problem  
2 afflicting Californians and Americans generally.

3 77. Eating more fruits and vegetables helps to reduce  
4 diseases. Eating five to nine servings of fruit and vegetables  
5 each day helps protect against heart disease and cancer. Eating  
6 fruits and vegetables also has the potential to reduce the risk  
7 of obesity and many other chronic diseases including stroke and  
8 diabetes.

9 78. California adults consume, on average, fewer than four  
10 daily servings of fruits and vegetables, well below the five to  
11 nine daily servings recommended for good health. As a result,  
12 efforts to encourage people to eat more fruits and vegetables are  
13 important to the future of the state and to the country.

14 79. Any increase in demand for California table grapes  
15 benefits California table grape grower/shippers and the State of  
16 California generally.

17 80. The domestic marketing program is implemented by a  
18 staff of 4 people, which includes Cindy Plummer, Jane Lytle,  
19 Karen Hearn, and Brad Brownsey (a consultant).

20 81. The domestic marketing program conducts domestic trade  
21 management as well as research and education and outreach.

22 82. The purpose of the program is to increase the movement  
23 of fresh California grapes from field to market or professional  
24 kitchen. The program targets (1) retailers and wholesalers of  
25 fresh grapes and (2) foodservice entities.

26 83. The Commission works with retailers and wholesalers to

1 increase the quantity of California table grapes sold during a  
2 season, the square feet of display space that will be allocated  
3 to California table grapes, the number of varieties displayed,  
4 the effectiveness of the displays, and the number and  
5 effectiveness of table grape advertisements run by retailers.

6 84. Among other things, the Commission works to "educate  
7 and instruct the . . . retail trade with respect to proper  
8 methods of handling and selling fresh grapes," as contemplated by  
9 the California Legislature.

10 85. The portion of the Commission's trade management  
11 program directed toward domestic retailers can be divided into  
12 the following subcategories: (a) category management; (b)  
13 promotional agreements; (c) tagged advertising, and (d) training.

14 86. Conducting category management research is one way the  
15 Commission seeks to encourage retail grocery stores to sell a  
16 greater volume of table grapes. Category management involves  
17 the development of a comprehensive strategy for expanding sales  
18 of a category of product, in this case California table grapes.  
19 Category management research—on which the Commission spent nearly  
20 a quarter of a million dollars in both 2004 and 2005—allows the  
21 Commission to provide retailers information about the value of  
22 selling fresh California grapes and the tactics that research has  
23 indicated increase sales of fresh grapes.

24 a. To conduct some of this research, the Commission  
25 contracts with a company called The Perishables Group, one of the  
26 country's top retail produce category management research firm.

1           b. The results of the Commission's category management  
2 research are then conveyed to the top 75 retailers (which  
3 together constitute approximately 80% of the market) in  
4 the United States and Canada. Commission staff meet with  
5 representatives from retailers at least twice during the growing  
6 season. Additionally, every year retailers are provided the  
7 Commission's marketing materials, which summarize the  
8 Commission's category management findings.

9           c. The Commission also conducts consumer research. For  
10 this work, the Commission contracts with Fleishman-Hillard, a  
11 national public relations and advertising firm.

12           d. In addition to the general category and consumer  
13 research data provided to retailers, the Commission also shares  
14 with retailers data related to that retailer's performance in  
15 the grape category. This information is provided to encourage  
16 retailers to increase grape ad activity.

17       87. Every year the Commission enters into promotional  
18 agreements with retailers and wholesalers.

19           a. Retailers that earn an award are required to spend  
20 the award through a third party. For example, retailers  
21 frequently use their promotion award funds to have the  
22 Commission book flights and hotel rooms for their employees  
23 attending the annual Produce Marketing Association ("PMA") Fresh  
24 Summit Conference.

25           b. Under the promotion agreement, retailers also agree  
26 to share with the Commission information about their grape sales

1 and advertising. This allows the Commission to evaluate  
2 effectiveness of the efforts overall and to ensure that the  
3 retailers have met all of their commitments.

4 88. The domestic marketing program offers retailers tagged  
5 advertising to encourage them to run more advertisements for  
6 grapes.

7 a. The three retailers with the highest volume of  
8 grape sales in a market are given the opportunity to have their  
9 store name featured in the billboard and radio ads if it agrees  
10 to conduct a certain level of advertising (running more grape  
11 ads, increasing size of grape ads) for grapes in the upcoming  
12 year. Retailers also must use California logos showing the  
13 California origin of the grapes they sell.

14 b. The retailer's logo, for example, might be placed  
15 on Commission billboard advertisements in the proximity of the  
16 retailer's stores. Similarly, the names of retailers can be used  
17 in the Commission's radio advertisements.

18 89. Because consumers prefer table grapes that are in good  
19 condition, the Commission also provides training or training  
20 materials to targeted retailers in the proper procedures for  
21 handling, storing, and displaying table grapes.

22 a. Each year the Commission makes available to  
23 retailers (via its website, on CDROMs, and in its Marketing  
24 Training Guide) materials providing information about  
25 grape displays, storage temperatures, backroom handling, and  
26 grape delivery.



1           b. Because there is constant turnover in produce  
2 departments, the Commission believes it must continually reach  
3 out to retailers.

4           c. In addition to providing training materials, the  
5 Commission also encourages retailers to put the Commission's  
6 advice to use by creating attractive grape displays for entry  
7 in the Commission's seasonal display contests. It is the  
8 Commission's goal to encourage retailers to use the techniques  
9 learned during the display contests throughout the California  
10 grape season.

11         90. The Commission devotes significant efforts to encourage  
12 foodservice providers to increase the amount of fresh grapes they  
13 use.

14           a. Because people today eat out in restaurants more  
15 frequently than ever before, the Commission's work targeting food  
16 service providers is thought to be important.

17           b. One way the Commission attempts to increase the  
18 volume of grapes used by foodservice providers is by working with  
19 menu developers. In order to encourage menu developers to use  
20 fresh grapes, the Commission has developed numerous recipes  
21 featuring fresh grapes that it sends to foodservice providers.

22           c. Commission representatives also meet with menu  
23 developers as frequently as possible. For example, in 2005, a  
24 Commission representative attended a leadership retreat for menu  
25 developers at the Culinary Institute of America in Napa.

26           d. In addition to developing and distributing recipes

1 featuring grapes and contacting menu developers, the Commission  
2 contacts editors and writers for foodservice publications. For  
3 example, every year a Commission representative attends an  
4 international foodservice editors' council in order to meet with  
5 editors and tell them about the many uses of grapes in recipes.

6 e. In aid of its efforts to increase the use of grapes  
7 by foodservice providers, the Commission has retained a  
8 registered dietician as a consultant. The registered dietician  
9 is able to answer nutrition questions from the foodservice  
10 industry as well as to help create information useful in  
11 foodservice education efforts.

12 f. The Commission uses the research it has funded on  
13 the health benefits of grapes in its efforts to expand their  
14 usage by foodservice providers.

15 91. In 2004-2005, the Commission's domestic marketing  
16 program spent \$ 1,445,242 in assessment dollars on the following  
17 categories of activities: \$1,066,748 trade management,  
18 \$328,554 research, and \$49,940 education and outreach.

19 92. Just four years ago, the Commission conducted little  
20 category management research, but now the Commission has  
21 developed a category management research program. In recognition  
22 of the Commission's new category management research efforts, the  
23 Commission recently won the "Category Captain" award for random  
24 weight produce from Progressive Grocer magazine.

25 93. In 2004, the Commission had incentive agreements in  
26 place with the retailers whose stores sell approximately 81.2% of

1 the table grapes sold in the United States and Canada. Each  
2 year the Commission provides rewards to retailers under these  
3 contracts totaling approximately \$450,000 to \$500,000.

4 94. Retailers participating in the Commission's September  
5 2005 display contest reported average increases of grape sales of  
6 217% over normal sales for that time period. Research shows that  
7 just over 50% of the (1251) table grape purchasers surveyed  
8 decide to buy grapes once they are in the store and just over 60%  
9 of those who decide in the store to buy grapes do so  
10 because the grapes look good.

11 95. The Commission undertakes an extensive amount of  
12 consumer preference research.

13 96. McDonald's decided in May 2005 to start selling the new  
14 Fruit and Walnut Premium Salad, which features fresh grapes. The  
15 appearance of fresh grapes on the McDonald's menu followed more  
16 than two years of work by the Commission with McDonald's menu  
17 developers. McDonald's indicated that it planned to buy 6.5  
18 million pounds of fresh grapes in 2005, but McDonald's has not  
19 made public the amount of California table grapes that actually  
20 were purchased that year.

21 97. A 1993 consumer survey indicated that 82% of responding  
22 primary grocery shoppers agreed that "grapes are a healthy,  
23 nutritious snack." A 2005 consumer survey indicated that 99% of  
24 U.S. and Canadian shoppers surveyed believe fresh grapes are  
25 "extremely good/good for you."

26 98. The primary activities of the Commission's

1 international marketing program can be broken down into three  
2 areas: (1) market access (which falls within the issue management  
3 category), (2) international trade management, and (3)  
4 international research.

5 a. The market access work undertaken involves efforts  
6 to increase access by California grapes to foreign export markets  
7 by opening markets, keeping them open, and reducing tariffs.

8 b. The international marketing program also includes  
9 market research on a range of subjects including consumer and  
10 trade attitudes, export protocols, and foreign production.

11 99. In 2004-2005, the Commission's international marketing  
12 program spent a total of \$4,666,522. Of that amount, \$1,288,853  
13 came from assessments and was spent on the following categories  
14 of activities: \$121,176 for education and outreach, \$170,114 for  
15 research, \$238,847 for issue management, and \$758,717 for trade  
16 management.

17 100. The market access work undertaken by the international  
18 marketing program is principally financed with assessment  
19 dollars.

20 101. The Commission received \$2,958,649 in MAP funds for  
21 2004; to date for the 2005 fiscal year the figure is \$2,501,538,  
22 as not all MAP funding has been received.

23 102. In order to obtain these funds, the Commission must  
24 agree to match a certain percentage of the MAP funds with its own  
25 funds. For 2005, the Commission agreed to match 79% of the  
26 MAP funds with its own spending.

1           103.   USDA data indicate that between 1995 and 2004 the  
2 volume of fresh grape exports has increased 63% and the value of  
3 those exports has increased 78%.

4           104.   In addressing market access issues, the Commission  
5 works closely with USDA and the Office of the U.S. Trade  
6 Representative ("USTR") in attempts to enhance the position of  
7 the table industry in negotiations between the United States and  
8 other governments. The Commission also retains a consultant,  
9 Bryant-Christie, Inc., that specializes in market access issues.

10          105.   Market access work is divided into three primary  
11 areas: opening markets, keeping markets open, and providing  
12 broader access through the elimination of tariff and nontariff  
13 trade barriers.

14          106.   First, the Commission works with USDA and USTR to  
15 attempt to open new markets to fresh California grapes. For  
16 example:

17               a.   In order to open the Australia market to California  
18 grapes, the Commission expended significant efforts from 1990 to  
19 2002 conducting research and working with the USDA and the USTR  
20 to negotiate a shipping protocol that called for grapes to be  
21 fumigated with methyl bromide. It also expends significant  
22 efforts helping to administer the shipping protocol put in place.

23               i.   In order to facilitate compliance with the  
24 protocol and to fund operations under the protocol, the  
25 Commission created the California Table Grape Export Association.  
26 The Association works directly with shippers and Australian

1 government officials to manage and coordinate inspections by the  
2 Australian officials of California table grapes being shipped to  
3 Australia.

4           ii. Each year, the Australian government also  
5 requires a list of all those entities that will be shipping to  
6 the Australian market, including their designated contact person,  
7 and their fumigation facility locations and operators. The  
8 Commission compiles this list for the USDA so that it can provide  
9 the information to its Australian counterparts.

10           b. The Commission also worked with USDA and the USTR  
11 to re-open the New Zealand market when its government closed the  
12 market to fresh California table grapes in 2001 because of fears  
13 that black widow spiders would enter New Zealand and threaten its  
14 consumers.

15           i. To help to resolve the problem, the Commission  
16 briefed California shippers exporting to New Zealand on how to  
17 improve their handling and shipping of table grapes to eliminate  
18 the presence of black widow spiders. The improvements in  
19 handling and shipping resulted from Commission sponsored studies  
20 of table grape box types and the use of carbon dioxide ("CO2")  
21 and sulfur dioxide ("SO2") to kill any black widow spiders that  
22 made their way into a shipment. Ultimately, the Commission,  
23 USDA, and the USTR were able to convince the New Zealand  
24 government that a shipment protocol involving appropriate box  
25 types and treatment was adequate protection.

26           ii. The Commission worked with county

1 agricultural inspectors in California and USDA to develop the  
2 protocol and assure the New Zealand government that it was being  
3 used uniformly. Through this effort, the New Zealand market was  
4 re-opened before the end of the 2002 California marketing period.

5 c. The Commission also worked closely with USDA Animal  
6 and Plant Health Inspection Service to convince the New Zealand  
7 government that cold treatment was unnecessary to prevent the  
8 introduction of glassy winged sharpshooters in California  
9 grape shipments. New Zealand repealed its cold storage  
10 requirement in 2005.

11 d. The Commission also worked with USDA and the USTR  
12 to open the India market to California table grapes in 2001.  
13 India had long been closed to imports or had extremely high  
14 tariffs or complex import permit requirements that sharply  
15 limited volumes. The Commission began working with USDA, the  
16 Indian government, and the Indian table grape industry  
17 approximately four years in advance of the opening of the market.  
18 A Commission representative was sent to India twice to pave the  
19 way for opening the market. When India started to liberalize its  
20 market to world trade in April 2001, the Commission immediately  
21 worked with the U.S. and Indian governments to help gain access  
22 and California table grape shipments were sent to India in that  
23 first season following the liberalization.

24 e. The Commission also helped to open the China market  
25 to lawful imports of California table grapes in 1997 following  
26 years of negotiation between the US and Chinese governments. The

1 US government worked to open the market at the urging of, and in  
2 conjunction with, the Commission. The Commission's role in  
3 opening the market was two-fold: keeping the US government  
4 focused on getting the market open; and participating with the US  
5 government in the development of a work plan that outlined the  
6 rules under which the fruit could be shipped between the two  
7 countries.

8 i. The agreement was negotiated between and  
9 signed by the governments of China and the United States, but  
10 like most market access issues in which the Commission is  
11 involved, the Commission played an important role in the  
12 negotiations. The Commission had a representative from Bryant  
13 Christie in attendance at most of the negotiation sessions,  
14 including the final session.

15 ii. To this day, China continues to require a  
16 list of approved shippers, and the Commission continues to be  
17 responsible for developing that list and maintaining it. It is  
18 submitted annually to USDA which in turn submits it to  
19 the Chinese government. The Mediterranean fruit fly trapping  
20 continues to be required, although in recent years the cost has  
21 been borne by the counties.

22 f. The Commission is also working to facilitate  
23 expanded shipments into China by California grower/shippers.

24 i. As noted above, China requires that all  
25 shippers of California grapes into China be registered. The list  
26 of registered shippers is given to Chinese customs officials at



1 all of the ports of entry. Any grapes from a shipper not on  
2 the list are turned away. At the request of China and the USDA,  
3 the Commission compiles and maintains the list. The list is  
4 compiled after soliciting California grower/shippers to sign up.  
5 After the list is compiled, it is given to USDA, which then gives  
6 the list to the Chinese authorities.

7 ii. In addition to working under the China  
8 protocol, the Commission is working to modify the protocol to  
9 permit inspections to be made in the U.S. at the port of exit.  
10 Under the current system, Chinese customs officials from time to  
11 time turn away shipments of fruit from registered shippers based  
12 on minor errors in the list or other mistakes.

13 iii. Additionally, the Commission is working with  
14 the USDA and the USTR to eliminate the Mediterranean fruit fly  
15 trapping program required by China and to open a new port in  
16 China to shipments of California table grapes.

17 107. Second, the Commission works with USDA, the USTR,  
18 foreign governments, and other interested parties to attempt to  
19 keep foreign markets open to California grapes by responding  
20 to incidents that arise that need a prompt resolution.

21 a. When exported California grapes are turned away by  
22 foreign customs officials or other critical export problems  
23 arise, the Commission responds by coordinating the efforts of the  
24 U.S. government, U.S. embassy officials, foreign industry, and  
25 foreign governments to attempt to resolve the problem.

26 b. Various impediments to exports periodically arise

1 requiring the Commission to work with others to attempt to avert  
2 two types of potential losses: immediate loss to the shippers  
3 whose fruit is sitting on a dock or at a border crossing awaiting  
4 approval to move, and loss to the industry as a whole from the  
5 closing of a market mid-season.

6 c. For example, a black widow spider was found in the  
7 United Kingdom in 2002 and threatened to close that market to  
8 California grapes. In 2004-2005, an European Union sulphur  
9 dioxide requirement almost closed the member countries' markets  
10 to California grapes. Mexico and Panama briefly closed in 1999  
11 due to misidentified pests. California grape shipments that had  
12 already arrived in Australia were held up in 2003 due to missing  
13 box stamps. Venezuelan shipments were disrupted due to the  
14 Venezuelan government reducing the number of, and volumes within,  
15 import permits they issue that allow fruit into that market.  
16 Concern about Mediterranean fruit flies in Taiwan almost closed  
17 that market to California grapes. The Commission responded  
18 to each of these incidents by working with the relevant  
19 governmental and private parties to keep the markets open.

20 108. Third, the Commission works with the USDA and the USTR  
21 to attempt to lower tariff and non-tariff barriers that impede  
22 the flow of California table grapes to foreign countries.

23 a. The Commission tracks international standards for  
24 grapes—including packaging standards, maturity/quality standards,  
25 and especially pesticide maximum residue levels ("MRLs")—and  
26 works with USDA, the USTR, foreign governments, and international

1 bodies to ensure that these standards are reasonable and based on  
2 an informed judgment about the costs and benefits of setting  
3 standards at various levels.

4 i. The Commission works with the Codex  
5 Alimentarius Commission (which was created in 1963 by the United  
6 Nations Food and Agriculture Organization and the World Health  
7 Organization) in its efforts to set international standards for  
8 grapes.

9 ii. The Commission works with USDA, the USTR, and  
10 other countries that import grapes to attempt to implement  
11 workable MRL standards in countries that import grapes and to  
12 develop reasonable packaging and labeling standards.

13 b. The Commission expends significant efforts working  
14 with USDA and the USTR to attempt to lower tariffs imposed by  
15 foreign countries.

16 i. The Commission has worked with the Bryant-  
17 Christie firm to attempt to lower tariffs on California grapes  
18 since 2004.

19 ii. The Commission has conducted a review of the  
20 tariffs applicable to California table grapes in numerous foreign  
21 countries and has outlined not only the tariffs that California  
22 grower/shippers must pay but also the tariffs that their  
23 competitors must pay.

24 iii. For the California table grape industry, the  
25 effort to reduce tariffs involves meeting with the USTR, the  
26 federal government agency responsible for the United States'

1 participation in the WTO negotiations, and urging the agency  
2 to attempt to secure the lowest possible tariffs for California  
3 grapes. The issue of lowering tariffs comes up frequently, both  
4 in the context of the WTO negotiations and regional negotiations,  
5 such as the Central America Free Trade Agreement. In these  
6 negotiations, it is important to keep the importance of lower  
7 tariffs for California table grapes in the negotiators' minds,  
8 and provide data in support of these requests. This can make the  
9 difference between having a reduced tariff take effect  
10 immediately versus having a high tariff maintained or phased out  
11 over an extended period, such as 12 years.

12 iv. By working to keep the issue of tariffs  
13 before the USTR, the Commission has helped to obtain tariff  
14 reductions for California table grapes in markets such as the  
15 Central America Free Trade Agreement countries and the Dominican  
16 Republic.

17 109. The Commission's international trade management  
18 activities, which are funded principally with MAP funds, target  
19 the trade: retailers, importers, and wholesalers. The goal of the  
20 program is to encourage retailers, importers, and wholesalers to  
21 buy more California grapes more often and during more of the  
22 California season (May-January).

23 110. The core of the Commission's international trade  
24 management effort is the work of its 15 overseas representatives  
25 who work directly with overseas retailers, importers, and  
26 wholesalers. They provide grape storage, handling, and display

1 information to retail stores.

2 111. The representatives also monitor local markets in  
3 their countries or regions and provide information that is  
4 conveyed in "Global Market Reports" that are sent twice a month  
5 during the California season to California table grape grower/  
6 shippers to help them, if they are interested, understand the  
7 dynamics at work in foreign markets.

8 112. A portion of the Commission's international trade  
9 management consists of "joint promotions" with retailers. These  
10 joint promotions include activities such as in-store  
11 demonstrations where the Commission employs people to provide  
12 information and grape tastings to consumers, competitions for  
13 consumers to enter at the point of sale of table grapes, cooking  
14 demonstrations at the point of sale, special displays including  
15 secondary display locations and center aisle locations, point of  
16 sale posters, banners and the like.

17 113. The Commission also provides financial awards to  
18 retailers for certain grape promotional activities, like offering  
19 samples or otherwise featuring California grapes.

20 114. In support of its market access and international  
21 trade management efforts, the Commission conducts research on  
22 various international topics.

23 a. A portion of that research work consists of foreign  
24 production studies designed to provide California grower/  
25 shippers, if they are interested, with specific information about  
26 competitive countries. The Commission has recently conducted

1 production studies of a number of countries, including China,  
2 Peru, and Spain. The studies examine grape production in foreign  
3 countries, and in China's case also the development of the  
4 infrastructure for the postharvest management and transportation  
5 of fresh grapes.

6 b. The Commission has also funded two transshipment  
7 studies. One tracked grapes that were exported to Malaysia but  
8 then transported across the border into Thailand. The other  
9 tracked grapes that traveled from China to Vietnam across their  
10 shared land border.

11 115. Exports of California table grapes have increased over  
12 the past decade.

13 a. According to USDA data, total exports of California  
14 table grapes to offshore markets and Mexico increased from  
15 122,451 metric tons in 1995 to 201,653 metric tons in 2004. The  
16 total volume of California table grapes exported over the past  
17 five years is higher than the previous five years.

18 b. Over the past five years (2000 versus 2004),  
19 exports to some of the industry's largest exports markets have  
20 increased. For instance, exports to Malaysia have increased 98%  
21 (+11,510 metric tons), exports to the United Kingdom have  
22 increased 30% (+3,396 metric tons), and exports to Indonesia have  
23 increased 152% (+6,694 metric tons).

24 116. Studies indicate that 94% of consumers surveyed in  
25 select markets in certain Central American countries are aware of  
26 U.S./California grapes, 78% of consumers surveyed in select

1 markets in China are aware of U.S./California grapes, 97% of  
2 consumers surveyed in select markets in Hong Kong are aware of  
3 U.S./California grapes, 57% of consumers surveyed in select  
4 markets in Japan are aware of U.S./California grapes, 85% of  
5 consumers surveyed in select markets in Indonesia are aware of  
6 U.S./California grapes, 65% of consumers surveyed in select  
7 markets in Malaysia are aware of U.S./California grapes, 87%  
8 of consumers surveyed in select markets in the Philippines are  
9 aware of U.S./California grapes, 65% of consumers surveyed in  
10 select markets in Singapore are aware of U.S./California grapes,  
11 and 95% of consumers surveyed in select markets in Taiwan are  
12 aware of U.S./California grapes. Research has also shown that  
13 awareness of U.S./California as an origin for grapes in most  
14 export markets significantly increases the likelihood of trial  
15 by the consumer.

16 117. To receive MAP and EMP funds, a party must provide a  
17 certain level of matching funds, which the Commission is able to  
18 do.

19 118. The Commission has been able to increase the amount of  
20 federal funds it receives while the its contribution has remained  
21 fairly stable. While federal funds allocated to the Commission  
22 increased 69% in the five years between 2000 and 2004, the  
23 Commission's contributions have increased only 20%.

24 119. The Commission has had success working with USDA and  
25 the USTR to open new markets to California table grapes. For  
26 example, since 1997, the Commission has been actively involved in

1 efforts with USDA and the USTR to open China, India, and  
2 Australia. It also worked with USDA and the USTR to re-open the  
3 New Zealand market.

4 120. The Commission works with USDA, the USTR, foreign  
5 governments, and interested parties to keep existing markets open  
6 to California grapes.

7 a. For example, the Commission's work with the U.K.  
8 government and U.K. retailers helped to keep the United Kingdom  
9 market open when U.K. retailers indicated they intended to stop  
10 importing California grapes in 2002 following the discovery of a  
11 black widow spider in a shipment of California table grapes.

12 i. The U.K. is one of the California table grape  
13 industry's largest export markets.

14 ii. The black widow discovery was noted in the  
15 press in London, and retailers indicated that they intended to  
16 stop buying California grapes. A few retailers continued to sell  
17 the product they had on their shelves and a few accepted loads of  
18 fruit that were already on the water but most did not. More  
19 important, major retailers indicated that California grapes would  
20 not be imported in the 2003 season.

21 iii. In response to the incident, the Commission  
22 President traveled to the U.K. in early January of 2003 to meet  
23 with retailers and importers. To address retailers concerns, the  
24 Commission put together a voluntary protocol for shipping to the  
25 U.K. that is designed to eliminate black widow spiders.

26 iv. The shipping protocol, which remains in



1 existence, requires shippers to register with the Commission in  
2 order to ship to the U.K. and agree to take certain steps pre-  
3 harvest to eliminate black widow spiders in the field and to  
4 submit to post-harvest fumigations and inspections. Shippers  
5 agree to have their names provided to buyers in the U.K. so that  
6 buyers know which shippers have agreed to abide by the shipping  
7 protocol.

8 v. As a result of the protocol, shipments to the  
9 United Kingdom resumed in 2003 and have been uninterrupted. The  
10 U.K. remains one of the industry's top markets. There have been  
11 no more reported spider finds.

12 b. In 2004, when different Member State  
13 interpretations of a European Union directive 95/2/EC were  
14 creating uncertainty about the tolerance level for sulfur dioxide  
15 on table grapes, the Commission, Bryant Christie, the USDA, and  
16 Freshfel (a European fresh produce importers association) entered  
17 into consultations with the European Commission to clarify the  
18 issue and press for a definitive SO<sub>2</sub> tolerance of 10 ppm on fresh  
19 grapes. This has led to a process currently underway to amend  
20 the E.U. legislation to clearly establish a 10 ppm SO<sub>2</sub> tolerance  
21 on fresh grapes. Approval of the amendment is expected by spring  
22 2006.

23 c. In late 2004, the Thai government suddenly released  
24 a Ministerial announcement effectively banning three chemicals by  
25 setting a zero tolerance on them, thereby preventing the  
26 importation of California table grapes. The Commission worked

1 with various departments of the U.S. government, including the  
2 U.S. Department of Agriculture Animal and Plant Health Inspection  
3 Service, the Foreign Agricultural Service, and the U.S. Embassy  
4 in Bangkok, Thailand to have the announcement reversed. The Thai  
5 government postponed the start date for implementation of this  
6 requirement, and the requirement has not yet been implemented.

7 d. The Commission tracks packaging, shipping, residue  
8 levels, and phytosanitary requirements imposed by countries that  
9 import California table grapes. It summarizes this data (along  
10 with marketing information) by country in a database that is  
11 accessible only to California table grape grower/shippers on a  
12 password-protected portion of the Commission's web site,  
13 [www.freshcaliforniagrapes.com/en-US/Growers/](http://www.freshcaliforniagrapes.com/en-US/Growers/InternationalTrade.htm)  
14 [InternationalTrade.htm](http://www.freshcaliforniagrapes.com/en-US/Growers/InternationalTrade.htm)>. This information is not available  
15 anywhere else.

16 121. The Commission's consumer education program is  
17 intended to provide consumers with information about the health  
18 and nutrition benefits of fresh California grapes and with  
19 information about the industry, with the goal of keeping  
20 California table grapes "top-of-mind" for consumers and educating  
21 them about grapes and California's fresh grape industry.

22 122. For example, the Commission sends recipe ideas,  
23 photography, and fresh California grape health information to  
24 newspaper food editors.

25 123. The Commission also regularly contacts writers and  
26 editors of consumer magazines to learn what would prompt them to

1 write stories about fresh grapes and then responds by providing  
2 them with the latest research on grape phytonutrient,  
3 photography, recipe ideas, and news about the industry.

4           a. For a current example, as a result of the  
5 Commission's outreach efforts, the October 2005 issue of the  
6 culinary magazine Gourmet contained a two-page story on grapes  
7 and the October 2005 issue of the culinary magazine Bon Apatite  
8 contained a four page article about cooking with table grapes and  
9 published a number of recipes using grapes.

10           124. In 2004, the Commission contacted television stations  
11 and cable broadcast networks and made available to them a  
12 spokesperson (Food Network host, celebrity chef, and award-  
13 winning cookbook author Kathleen Daelemans) hired by the  
14 Commission to explain how fresh California grapes can be an  
15 important part of a healthy diet. In response, 47 television  
16 stations decided to air footage of Ms. Daelemans talking about  
17 grapes. She also appeared by tape on the Health and Home Report,  
18 a syndicated television show that airs on cable broadcast  
19 networks.

20           125. The Commission produces educational brochures and  
21 publications that detail the history of the industry, the health  
22 benefits of eating fresh grapes, and usage ideas such as freezing  
23 grapes for a cool summertime treat or adding them to salads for a  
24 pleasing hint of sweetness, color, and a crisp texture. This  
25 information is also included on the commission's website at  
26 [www.freshCaliforniagrapes.com](http://www.freshCaliforniagrapes.com).

1           126. The Commission sends materials to members of the  
2 American Dietetic Association and meets with dietitians,  
3 nutritionists, and family physicians, answering their questions  
4 about the health benefits of fresh California grapes and  
5 providing them with the information and resources the Commission  
6 thinks they need to confidently recommend to their clients,  
7 consumers, or patients that fresh California grapes should be a  
8 part of their diet.

9           a. In 2005, the Commission went to the annual  
10 convention of the American Academy of Family Physicians and spoke  
11 with the doctors in attendance about the health benefits of fresh  
12 California grapes. The Commission interviewed the doctors about  
13 healthy eating, and those interviews were then used in a video  
14 and an audio news release for television and radio stations about  
15 healthy eating and the benefits of fresh California grapes as  
16 part of a healthy diet.

17           127. Each year the Commission sends out news releases  
18 announcing the start of the California table grape season and  
19 conducts outreach on television (e.g., sending grapes to  
20 television newscasters and conducting live interviews) to tell  
21 people that they are now able to purchase California grapes.

22           128. In 2004-2005, the Commission's consumer education  
23 program spent \$694,229 in assessment dollars on the following  
24 categories of activities: \$56,084 on research and \$638,145 on  
25 education and outreach.

26           129. The Commission provides information about California

1 table grapes to newspapers to encourage them to run stories about  
2 California grapes. The firm that tracks news coverage for the  
3 Commission (Burrelle's Information Services) found that in 2004 a  
4 significant number of stories about fresh grapes and the  
5 California industry were based on this information.

6 130. The Commission also provides information about  
7 California grapes to magazine writers and editors. The consumer  
8 research and public relations firm Fleishman-Hillard found that  
9 in 2004, more than 90 articles based on this information appeared  
10 in major consumer magazines like Better Homes and Gardens, Bon  
11 Appetit, Family Circle, Good Housekeeping, Martha Stewart Living,  
12 and Woman's Day.

13 131. In addition to the Commission activities that fall  
14 generally within one of the five principal Commission programs, a  
15 number of Commission issue management activities fall outside of  
16 the established programs. One such activity is the Commission's  
17 phytonutrient research program. Another is its work with  
18 foundations that work to educate consumers about the value of a  
19 good diet.

20 132. The Commission's phytonutrient research program funds  
21 research into the potential health benefits of table grapes.

22 133. In 1997, a researcher from the University of Illinois,  
23 Chicago, published a study that found that a substance called  
24 resveratrol fought cancer at three different stages of its  
25 growth. The predominant dietary source of resveratrol is grapes.

26 134. The Commission, after speaking with the researcher,

1 Dr. John Pezzuto, held a symposium on grape phytonutrient among  
2 researchers exploring the human health potential of grape  
3 compounds and then created a scientific advisory panel, chaired  
4 by Dr. Pezzuto, to advance the science linking fresh grapes with  
5 the prevention of disease and improved human health.

6 a. The panel consists of Dr. Pezzuto, currently Dean  
7 of the College of Pharmacy, Nursing and Health Sciences at Purdue  
8 University, Dr. Richard Moon with the University of Illinois,  
9 Chicago, Dr. Le Creasy of Cornell University, Dr. Richard Van  
10 Breemen with the University of Illinois, Chicago, Dr. Myron Gross  
11 with the University of Minnesota, and one member of the  
12 Commission board, Fred Smeds.

13 135. One of the foundations of the Commission's research is  
14 a standardized preparation of fresh California grapes used for  
15 the research, which the Commission developed.

16 a. The grapes are collected from throughout  
17 California's growing region during the growing season which runs  
18 from May through December. The grapes are frozen, blended, and  
19 freeze-dried in a proprietary process that ensures that the  
20 compound contains all of the biologically active compounds found  
21 in fresh California grapes.

22 136. Since 1998, the Commission has funded or supported 29  
23 research studies.

24 137. As research studies are completed and published and  
25 new information about the impact of grape consumption on human  
26 health is generated, this information is disseminated to the

1 media and others, such as dietitians, nutritionists, and family  
2 physicians.

3 138. In 2004-2005, the Commission spent approximately  
4 \$270,000 on its phytonutrient research efforts.

5 139. The Commission has been and continues to be involved  
6 in the efforts to address obesity and improve the health of  
7 consumers by working with various foundations that educate  
8 consumers about the value of a good diet.

9 a. The Commission assisted in the creation of and  
10 works with the California and national 5-A-Day programs, in  
11 conjunction with the California Department of Health Services,  
12 the National Cancer Institute, and the Center for Disease  
13 Control. These efforts encourage all Americans to eat five or  
14 more servings of fruits and vegetables each day in order to  
15 prevent obesity and other disease. The Commission was a founding  
16 partner of both organizations and remains actively involved.

17 b. The Commission's Vice President serves on a  
18 committee of the Produce for Better Health Foundation ("PBH") and  
19 sits on the board of Spoons Across America, two organizations  
20 that are actively involved in improving the quality of Americans'  
21 diet. PBH educates consumers about the importance of eating more  
22 fruits and vegetables, and Spoons Across American teaches  
23 children about good nutrition and provides them with the basic  
24 cooking skills they need to have control over their own diet.

25 c. The Commission's Vice President of Domestic  
26 Marketing serves on the PBH board and Marketing Committee and as

1 the co-chair of the Joint Steering Committee for the California  
2 Nutrition Network and California 5 A Day program.

3 140. The Commission's efforts to develop a standardized  
4 freeze-dried mixture of California grapes that can be used in  
5 research projects have helped improve research on the health  
6 benefits of grapes.

7 141. Researchers funded by the Commission have found links  
8 between the compounds in fresh California grapes and fighting or  
9 preventing diseases such as cancer, heart disease, and  
10 degenerative nerve damage.

11 142. The Commission's health research program and the work  
12 of its Scientific Advisory Panel has been helpful in generating  
13 research and awareness of the health potential for fresh grapes  
14 and fresh grape compounds in the scientific community. For  
15 example, there are researchers exploring potential links between  
16 grapes and prevention of certain viruses as well as prevention of  
17 Alzheimer's disease.

18 143. Consumer research by the Commission has shown that the  
19 existence of a health claim that eating grapes is beneficial to  
20 one's health would motivate some primary grocery shoppers to  
21 purchase and consume more fresh California grapes more often.

22 144. Research by the Commission has shown that awareness of  
23 the health benefits of fresh California grapes can be a  
24 motivating purchase factor for a majority of primary grocery  
25 shoppers even without the health claim.

26 145. The Commission's support of the California and



1 national 5 A Day programs and the Produce for Better Health  
2 Foundation, in conjunction with the efforts of other groups, has  
3 been important in those programs in encouraging Californians and  
4 Americans to eat more fruits and vegetables and thereby improve  
5 their health.

6 146. If an individual promotion program would be profitable  
7 without a generic promotion program, it would also be profitable  
8 with a generic promotion program.

9 147. The process of obtaining the federal funds used by the  
10 Commission is complex and cumbersome, but the Commission is  
11 willing and able to dedicate the resources necessary to  
12 obtain the funding.

13 148. The Commission is able to provide the matching funds  
14 required to obtain federal export grant money.

15 149. Individual grape grower/shippers do not have the  
16 incentive to conduct the consumer education activities undertaken  
17 by the Commission.

18 150. The Plaintiffs conduct no significant direct  
19 advertising to consumers.

20 a. When Plaintiffs Susan Neill Company and Lucas  
21 Brothers Partnership grew and shipped California table grapes,  
22 they advertised only in trade publications, and that  
23 advertising (which was for Lucas Brothers grapes) was relatively  
24 limited.

25 b. Virtually all of Plaintiff Delano Farms'  
26 advertising is in trade publications.

1           151. The Susan Neill Company and Lucas Brothers Partnership  
2 no longer grow or ship California table grapes and therefore no  
3 longer pay assessments to the Commission.

4           152. Susan Neill Company has never itself borne the cost of  
5 the assessments paid on grapes it has shipped. Susan Neill  
6 Company has always passed the cost of the assessment on to Lucas  
7 Brothers Partnership.

8           153. The Commission was created by the California  
9 Legislature, and the Legislature has defined its duties.

10          154. The CDFA oversees and conducts voting on five-year and  
11 special termination referenda under the Ketchum Act.

12          155. The CDFA oversees the nomination and selection of  
13 producers eligible to be appointed to the Commission board by the  
14 Secretary.

15          156. All of the Commissioners of the Commission are  
16 appointed and subject to removal by the Secretary.

17               a. Growers hold nominating meetings followed by  
18 elections to determine who they will recommend to the Secretary  
19 for appointment.

20               b. The Secretary then determines who to appoint to the  
21 Commission and appoints that person.

22               c. Prior to appointment, the CDFA inquires into  
23 whether potential commissioners are suitable for appointment.

24               d. The Secretary is authorized to remove a  
25 commissioner if necessary.

26          157. The Commission, like other mandated commodity

1 organizations overseen by the CDFA, pays its share of the common  
2 expenses incurred by the marketing branch of the CDFA.

3 158. California table grape growers have filed grievances  
4 with the Commission, as permitted under the Ketchum Act, on at  
5 least four occasions in the past.

6 159. When a grievance is filed, the grower is given an  
7 opportunity to present his position to the Commission and then  
8 the Commission renders a decision, which can be appealed to the  
9 CDFA.

10 160. In 2004, a grower appealed the Commission's denial of  
11 his request for disclosure of the salary of the Commission  
12 President under the Public Records Act. After receiving the  
13 appeal, the Secretary asked the Commission to submit the video  
14 tape of the hearing at which the grievance was presented and to  
15 explain the rationale behind its decision. After considering the  
16 Commission's submission, the Secretary rendered a decision  
17 reversing the Commission's determination and ordered disclosure  
18 of the salary. The Secretary held that the Commission "is a  
19 government entity within the meaning of the Public Records Act."  
20 The Commission then disclosed the requested information as  
21 ordered.

22 161. The CDFA has indicated that if a person complained to  
23 the CDFA about a Commission advertisement, the CDFA would review  
24 the matter internally and could act to block the ad or advise  
25 that it be changed.

26 162. Each month the Commission receives the CDFA's

1 Marketing Memo, which contains information and instructions for  
2 marketing orders, agreements, councils, and commissions.

3 163. The CDFA has provided guidance to the Commission  
4 regarding the level of reserves it maintains.

5 164. The CDFA can, if it wants, request that the Commission  
6 provide it with information, including notices of meetings,  
7 meeting minutes, contracts, and copies of advertisements.

8 165. The Commission responds to any requests for  
9 information from CDFA marketing branch staff.

10 166. The CDFA conducts audits of grape shippers on behalf  
11 of the Commission.

12 167. The Commission complies with certain legal  
13 requirements imposed on some state agencies.

14 a. All of the Commission's meetings are conducted in  
15 accordance with the Bagley- Keene Open Meeting Act, as directed  
16 by the CDFA. Accordingly, the Commission gives notice of all of  
17 its meetings and its meetings are generally open to the public.

18 b. The Commission is required to comply with the  
19 Public Records Act.

20 c. The Commission is required to and does submit a  
21 Statement of Facts Roster of Public Agencies Filing to the  
22 California Department of State every year.

23 d. The Commission's Commissioners are required each  
24 year to submit disclosure statements to the Fair Political  
25 Practices Commission every year.

26 168. Commission employees are eligible to participate in

1 the state's Savings Plus Program, a retirement saving program for  
2 state employees, but are not required to.

3 169. The CDFA provides Commission employees with a template  
4 for creating identification cards that allow them to take  
5 advantage of special rates for state employees, but said  
6 employees are not required to do so.

7 170. Commission employees may, and are encouraged by the  
8 CDFA to, use State of California employee travel discounts.

9 E. STANDING OF THE SUSAN NEILL COMPANY AND LUCAS BROTHERS  
10 PARTNERSHIP.

11 A footnote to the Commission's opening memorandum supporting  
12 its motion for summary judgment argues that Plaintiffs The Susan  
13 Neill Company and Lucas Brothers Partnership lack standing to  
14 seek any prospective relief because they stipulated that these  
15 plaintiffs "no longer grow or ship California table grapes and  
16 therefore no longer pay assessments to the Commission."

17 Plaintiffs respond that this stipulated fact is "irrelevant  
18 to the extent that these two Plaintiffs are seeking refunds of  
19 past paid assessments." This is a concession that The Susan  
20 Neill Company and Lucas Brothers Partnership no longer have  
21 standing to obtain prospective relief.

22 The Commission also cites to the stipulated fact that the  
23 "Susan Neill Company has never itself borne the cost of the  
24 assessments paid on grapes it has shipped [and that] Susan Neill  
25 Company has always passed the cost of the assessment on to Lucas  
26 Brothers Partnership". Plaintiffs respond by an objection on the

1 ground of relevance. In a footnote to their opposition brief to  
2 the Commission's motion for summary judgment, Plaintiffs object  
3 to the contention that the Susan Neill Company has no standing:  
4 "First of all Susan Neill is married to George Lucas, general  
5 partner of Lucas Bros. partnership. Secondly, the Susan Neill  
6 Company does have standing since the [Act] does require the  
7 shipper (Susan Neill) to actually pay the assessments to the  
8 Commission, regardless of whether she passes that on to Lucas  
9 Bros."

10 As the Commission correctly responds, Plaintiffs'  
11 contentions do not establish standing for The Susan Neill  
12 Company:

13 Whether Ms. Neill is married to Mr. Lucas ...  
14 says nothing about whether The Susan Neill  
15 Company can recover assessments for which it  
16 was reimbursed and seek declaratory and  
17 injunctive relief with respect to a law that  
18 no longer affects it. Moreover, because The  
19 Susan Neill Company seeks only a refund of  
past assessments, not recovery of any  
administrative costs it might have incurred  
in paying assessments on behalf of Lucas  
Bros. Partnership ..., that fact that it  
'actually pa[id] the assessments' before  
getting reimbursed is irrelevant.

20 The Commission's motion for partial summary judgment on the  
21 grounds that The Susan Neill Company lacks standing to obtain  
22 relief as that entity never paid assessments and that the Lucas  
23 Brothers Partnership lacks standing to obtain prospective as  
24 opposed to past relief is GRANTED and Plaintiffs' motion for  
25 summary judgment on this issue is DENIED.

26 F. GOVERNMENT SPEECH.

1       The parties respectively move for summary judgment that the  
2 Commission's program is or is not "government speech," subject or  
3 not subject to First Amendment protections.

4       Relying on the Supreme Court's opinion in *Johanns v.*  
5 *Livestock Marketing Ass'n.*, 544 U.S. 550 (2005), Plaintiffs argue  
6 that the Act's provisions and the California Department of Food  
7 and Agriculture's involvement "in the Commission's speech, let  
8 alone [the Commission's] activities, [are] not even arguably in  
9 the same ball park compared to the control over the make-up and  
10 communications of the Beef Board." Plaintiffs argue the  
11 Commission's program is not "government speech" as that term is  
12 defined in *Johanns* and summary adjudication in their favor on  
13 this issue is appropriate.

14       The Commission rejoins that the Commission's speech is  
15 "government speech" for three reasons: "(1) the messages  
16 Plaintiffs challenge were mandated by the California Legislature;  
17 (2) the Commission itself is a governmental entity; and (3) the  
18 CDFA retains effective control over the Commission's speech  
19 because it appoints and can remove Commission board members and  
20 is empowered to reverse any improper actions taken by the  
21 Commission."

22       1. *Johanns v. Livestock Marketing Ass'n.*

23       In *Johanns v. Livestock Marketing Ass'n.*, the Supreme Court  
24 addressed "whether the generic advertising at issue is the  
25 Government's own speech and therefore is exempt from First  
26 Amendment scrutiny." 544 U.S. at 553. The Beef Promotion and

1 Research Act of 1985, 7 U.S.C. § 2901(b), announces a federal  
2 policy of promoting the marketing and consumption of "beef and  
3 beef products." The statute directs the Secretary of Agriculture  
4 to implement this policy by issuing a Beef Promotion and Research  
5 Order (Beef Order or Order) and specifies four key terms the Beef  
6 Order must contain: (1) The Secretary is to appoint a Cattlemen's  
7 Beef Promotion and Research Board (Beef Board or Board), whose  
8 members are to be a geographically representative group of beef  
9 producers and importers, nominated by trade associations; (2) the  
10 Beef Board is to convene an Operating Committee, composed of 10  
11 Beef Board members and 10 representatives named by a federation  
12 of state beef councils; (3) the Secretary is to impose a \$1-per-  
13 head assessment or checkoff on all sales or importation of cattle  
14 and a comparable assessment on imported beef products; and (4)  
15 the assessment is to be used to fund beef-related projects,  
16 including promotional campaigns, designed by the Operating  
17 Committee and approved by the Secretary.

18 The Secretary promulgated the Beef Order with the specified  
19 terms. The assessment is collected primarily by state beef  
20 councils, which then forward the proceeds to the Beef Board. The  
21 Operating Committee proposes projects to be funded by the  
22 checkoff, including promotion and research. The Secretary or his  
23 designee approves each project and, in the case of promotional  
24 materials, the content of each communication. Respondents sued  
25 the Secretary in federal court, arguing based on *United Foods*  
26 that the advertising promotes beef as a generic commodity which



1 impedes their efforts to promote the superiority of American  
2 beef, grain-feed beef, or certified Angus or Hereford beef. *Id.*  
3 at 554-555. After a bench trial, the district court ruled for  
4 respondents, declaring that the Beef Act and Beef Order  
5 unconstitutionally compel respondents to subsidize speech to  
6 which they object, and rejected the Government's contention that  
7 the checkoff survives First Amendment scrutiny because it funds  
8 only government speech. *Id.*, at 556.

9       The Eighth Circuit affirmed the district court, although the  
10 Eighth Circuit did not find that the challenged advertising was  
11 government speech. Instead, the Eighth Circuit found that  
12 government speech is relevant only to First Amendment challenges  
13 to the speech's content, not to challenges to compelled funding  
14 for the speech, and that compelled funding of speech may violate  
15 the First Amendment even if the speech in question is the  
16 government's. *Id.*, at 556-557.

17       The Supreme Court noted that it had sustained First  
18 Amendment challenges to compelled expression in two categories of  
19 cases: "true 'compelled speech' cases in which an individual is  
20 obliged personally to express a message he disagrees with,  
21 imposed by the government; and 'compelled subsidy' cases, in  
22 which an individual is required by the government to subsidize a  
23 message he disagrees with, expressed by a private entity." *Id.*,  
24 at 557. The Supreme Court recognized that it had not previously  
25 considered "the First Amendment consequences of government-  
26 compelled subsidy of the government's own speech." *Id.*

1 Respondents there argued that the challenged promotional  
2 campaigns "differ dispositively from the type of government  
3 speech that, our cases suggest, is not susceptible to First  
4 Amendment challenge" by pointing to "the role of the Beef Board  
5 and its Operating Committee in designing the promotional  
6 campaigns, and to the use of a mandatory assessment on beef  
7 producers to fund the advertising." *Id.*, at 560.

8 As to the identity of the speaker, respondents argued that  
9 "speech whose content is effectively controlled by a  
10 nongovernmental entity - the Operating Committee - cannot be  
11 considered 'government speech.'" The Supreme Court ruled: "We  
12 need not address this contention, because we reject its premise.  
13 The message of the promotional campaigns is effectively  
14 controlled by the Federal Government itself." *Id.* From this  
15 conclusion, the Supreme Court reasoned:

16 We therefore need not label the Operating  
17 Committee as 'governmental' or  
18 'nongovernmental.' The entity to which  
19 assessments are remitted is the Beef Board,  
20 all of whose members are appointed by the  
21 Secretary pursuant to law. The Operating  
22 Committee's only relevant involvement is  
23 ancillary - it designs the promotional  
24 campaigns, which the Secretary supervises and  
25 approves - and its status as a state actor is  
26 not directly at issue.

22 *Id.*, at 560 n.4. In explaining this conclusion, the Supreme  
23 Court stated:

24 The message set out in the beef promotions is  
25 from beginning to end the message established  
26 by the Federal Government. Congress has  
directed the implementation of a 'coordinated  
program' of promotion, 'including paid

1 advertising, to advance the image and  
2 desirability of beef and beef products.' 7  
3 U.S.C. §§ 2901(b), 2902(13). Congress and  
4 the Secretary have also specified, in general  
5 terms, what the promotional campaigns shall  
6 contain, see, e.g., § 2904(4)(B)(i) (campaigns  
7 'shall ... take into account' different types  
8 of beef products), and what they shall not,  
9 see, e.g., 7 CFR § 1260.169(d)  
10 (2004) (campaigns shall not, without prior  
11 approval, refer 'to a brand or trade name of  
12 any beef product'). Thus, Congress and the  
13 Secretary have set out the overarching  
14 message and some of the elements, and they  
15 have left the development of the remaining  
16 details to an entity whose members are  
17 answerable to the Secretary (and in some  
18 cases appointed by him as well).

19 Moreover, the record demonstrates that the  
20 Secretary exercises final approval authority  
21 over every word used in every promotional  
22 campaign. All proposed promotional messages  
23 are reviewed by Department officials both for  
24 substance and for wording, and some proposals  
25 are rejected or rewritten by the Department  
26 ... Nor is the Secretary's role limited to  
final approval or rejection; officials of the  
Department also attend and participate in the  
open meetings at which proposals are  
developed ....

1 This degree of governmental control over the  
2 message funded by the checkoff distinguishes  
3 these cases from *Keller*. There the state  
4 bar's communicative activities to which the  
5 plaintiffs objected were not prescribed by  
6 law in their general outline and not  
7 developed under official government  
8 supervision. Indeed, many of them consisted  
9 of lobbying the state legislature on various  
10 issues ... When, as here, the government sets  
11 the overall message to be communicated and  
12 approves every word that is disseminated, it  
13 is not precluded from relying on the  
14 government speech doctrine merely because it  
15 solicits assistance from nongovernmental  
16 sources in developing specific messages.

17 *Id.*, at 560-562.

1       The Supreme Court rejected the argument that the beef  
2 program does not qualify as "government speech" because it is  
3 funded by a targeted assessment on beef producers, rather than by  
4 general revenues, thereby giving control to a narrow interest  
5 group that will not heed respondents' objections, as opposed to  
6 politically accountable legislators:

7             ... The compelled-*subsidy* analysis is  
8 altogether unaffected by whether the funds  
9 for the promotions are raised by general  
10 taxes or through a targeted assessment.  
11 Citizens may challenge compelled support of  
12 private speech, but have no First Amendment  
right not to fund government speech. And  
that is no less true when the funding is  
achieved through targeted assessments devoted  
exclusively to the program to which the  
assessed citizens object ....

13             Some of our cases have justified compelled  
14 funding of government speech by pointing out  
15 that government speech is subject to  
16 democratic accountability ... But our  
17 references to 'traditional political  
18 controls' ... do not signify that the First  
19 Amendment duplicates the Appropriations  
20 Clause ... or that every instance of  
21 government speech must be funded by a line  
22 item in an appropriations bill. Here, the  
23 beef advertisements are subject to political  
24 safeguards more than adequate to set them  
25 apart from private messages. The program is  
26 authorized and the basic message prescribed  
by federal statute, and specific requirements  
for the promotions' content are imposed by  
federal regulations promulgated after notice  
and comment. The Secretary of Agriculture, a  
politically accountable official, oversees  
the program, appoints and dismisses the key  
personnel, and retains absolute veto power  
over the advertisements' content, right down  
to the wording. And Congress, of course,  
retains oversight authority, not to mention  
the ability to reform the program at any  
time. No more is required.

1 *Id.*, at 562-564.

2 Finally, the Supreme Court refused to rule on the contention  
3 that crediting the advertising to "American Beef Producers"  
4 impermissibly uses not only their money but also their seeming  
5 endorsement to promote a message with which they do not agree.  
6 Respondents had argued to the Supreme Court that  
7 "[c]ommunications cannot be 'government speech' ... if they are  
8 attributed to someone other than the government; and the person  
9 to whom they are attributed, when he is, by compulsory funding,  
10 made the unwilling instrument of communication, may raise a First  
11 Amendment objection." *Id.*, at 564. The Supreme Court stated:

12 We need not determine the validity of this  
13 argument - which relates to compelled speech  
14 rather than compelled *subsidy* - with regard  
15 to respondents' facial challenge. Since  
16 neither the Beef Act nor the Beef Order  
17 requires attribution, neither can be the  
18 cause of any possible First Amendment harm.  
19 The District Court's order enjoining  
20 enforcement of the Act and the Order thus  
21 cannot be sustained on this theory.

22 On some set of facts, this second theory  
23 might (again, we express no view on the  
24 point) form the basis for an as-applied  
25 challenge - if it were established, that is,  
26 that individual beef advertisements were  
attributed to respondents. The record,  
however, includes only a stipulated sampling  
of these promotional materials ... and none  
of the exemplars provides any support for  
this attribution theory except for the  
tagline identifying the funding. Respondents  
apparently presented no other evidence of  
attribution at trial and the District Court  
made no factual findings on the point. ...  
Whether the *individual* respondents who are  
beef producers would be associated with  
speech labeled as coming from "America's Beef  
Producers' is a question on which the trial

1 record is altogether silent. We have only  
2 the funding tagline itself, a trademarked  
3 term that, standing alone, is not  
4 sufficiently specific to convince a  
5 reasonable factfinder that any particular  
6 beef producer, or all beef producers, would  
7 be tarred with the content of each  
8 trademarked ad.

9 *Id.*, at 564-566.<sup>2</sup>

10 2. *Paramount Land Co., LP v. Cal. Pistachio Com'n.*

11 Since these motions for summary judgment were argued and  
12 submitted, the Ninth Circuit decided *Paramount Land Co., LP v.*  
13 *Cal. Pistachio Com'n*, 491 F.3d 1003 (9<sup>th</sup> Cir.2007).

14 In *Paramount*, a group of pistachio growers (collectively  
15 referred to as Paramount) challenged the marketing and  
16 promotional activities of the California Pistachio Commission  
17 under the First Amendment and on various state law grounds.  
18 Paramount moved the District Court for a preliminary injunction.  
19 The District Court granted the preliminary injunction on the  
20 ground that it was unlikely that the California state government  
21 exercised effective control over the Pistachio Commission for its  
22 expressive activity to qualify as "government speech" under  
23 *Johanns*" and that, under *Glickman v. Wileman Brothers & Elliott,*  
24 *Inc.*, 521 U.S. 457, 469-470 (1997) and *United States v. United*  
25 *Foods, Inc.*, 533 U.S. 405, 415 (2001), the assessments funded by  
26 the Pistachio Commission probably were not part of a larger  
economic regulatory scheme so as to make them constitutionally

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<sup>2</sup>In this case, there is no attribution to Plaintiffs of any of the Commission's advertising and promotions.

1 permissible under *Glickman*. 491 F.3d at 1008. On appeal, the  
2 Ninth Circuit addressed "whether this generic advertising is 'the  
3 Government's own speech and therefore is exempt from First  
4 Amendment scrutiny' under the Supreme Court's analysis in *Johanns*  
5 *v. Livestock Marketing Association*." *Id.*, at 1005. *Paramount*  
6 describes the state regulation of pistachios:

7       The California state legislature created the  
8       Pistachio Commission 'to enhance and preserve  
9       the economic interests of the State of  
10       California,' by among other activities,  
11       '[i]mplement[ing] public policy through [its]  
12       expressive conduct.' Cal. Food & Agric. Code  
13       § 63901. The Pistachio Commission  
14       administers the Pistachio Act and supports  
15       the pistachio industry through advertising,  
16       marketing, research, and government relations  
17       campaigns. See Pistachio Act § 69051.

18       The Pistachio Commission is authorized to  
19       undertake a broad range of activity: (1)  
20       research into production, food safety,  
21       marketing, crop protection and production  
22       materials, (2) promotion of the elimination  
23       of trade barriers, (3) consumer education  
24       regarding the health benefits of pistachios,  
25       (4) demand-side regulation to stabilize the  
26       market, (5) analysis of relevant foreign,  
27       federal and state regulation, (6) cooperative  
28       crisis resolution, (7) cooperation with state  
29       and federal agencies in foreign negotiations,  
30       and (8) support of industry self-regulation.  
31       See Cal. Food & Agric. Code §§ 63901-63901.3.  
32       This regulatory scheme, which applies to all  
33       councils and commissions relating to  
34       agricultural or seafood markets in  
35       California, is designed to 'work subject to,  
36       and together with, the constraints placed on  
37       the agricultural industry by state and  
38       federal statutes and regulations and  
39       international restrictions.' *Id.* § 69301.4.

40       The Pistachio Commission has nine members,  
41       eight selected by California pistachio  
42       growers and one selected by the Secretary of  
43       the California Department of Food and



1 Agriculture ('CDFA'). Pistachio Act § 69031.  
2 Acting through committees chaired by the  
3 commissioners, the Commission meets three  
4 times a year and employs a full-time staff to  
5 handle daily operations. In addition to  
6 appointing one member of the committee [sic],  
7 the Secretary of the CDFA (or a designee),  
8 may attend and participate in the Pistachio  
9 Commission or committee meetings as an *ex*  
10 *officio* member. *Id.* Like other entities in  
11 the state government, the Commission is  
12 subject to transparency and ethics  
13 regulations designed to promote public  
14 accountability.

15 The Secretary retains broad statutory  
16 authority to: (1) review and approve the  
17 Pistachio Commission's annual budget and  
18 planned activities, (2) conduct fiscal and  
19 compliance audits, (3) approve nomination and  
20 election procedures, (4) decide appeals from  
21 grievance petitions filed by growers, and (5)  
22 suspend or discharge the Commission's  
23 president. See *id.* §§ 69051, 69069, 69092.  
24 The Secretary may also require the Pistachio  
25 Commission to 'correct or cease any activity  
26 or function that is determined by the  
secretary not to be in the public interest or  
to be in violation of [the Pistachio Act]."  
*Id.* § 69032. Although the Secretary has  
ultimate authority over the Commission's  
budget, operations, and planning, the  
Secretary has declined to exercise many of  
his more specific statutory powers.

19 Paramount and its various affiliated entities  
20 are the largest producers of pistachios in  
21 California, together paying between 25 and 30  
22 percent of the Pistachio Commission's total  
23 assessments in recent years. The expressive  
24 activity that has attracted Paramount's ire  
25 centers around generic print and public  
26 relations advertising campaigns for  
California pistachios. The most recent  
campaign features the logo 'California  
Pistachios' and the slogan 'Grab a Handful.'  
The campaign included print advertising in  
magazines, media mailings, a satellite tour,  
talk-show appearances by spokesperson Jane  
Seymour, and promotion at the retail level  
(including point-of-sale promotional



1 materials, price recommendations, and  
2 advertising incentives). Paramount maintains  
3 that these campaigns are 'ineffective in  
4 augmenting pistachio sales,' 'do not  
5 adequately feature the nuts themselves,' and  
6 are 'antithetical to Paramount's interests,'  
7 which are to 'increase sales by  
8 differentiating its product from competitor's  
9 products.'

10 Paramount also targets the Pistachio  
11 Commission's government relations activities,  
12 which are coordinated by a political  
13 consultant who hires lawyers to represent the  
14 industry before the International Trade  
15 Commission and the Commerce Department, and  
16 to lobby government entities on behalf of the  
17 pistachio industry. Paramount complains that  
18 the Pistachio Commission has 'not done enough  
19 to protect the domestic pistachio industry  
20 from foreign pistachios.'

21 These offending activities [of the Pistachio  
22 Commission complained of by Paramount] are  
23 funded by mandatory assessments paid by  
24 pistachio producers and importers (via  
25 processors who deduct dues from the amount  
26 they pay the producers). See *id.* §§ 69081 &  
69085. Failure to pay invites financial  
penalties and possible enforcement action by  
the Pistachio Commission. *Id.* §§ 69088-93.  
The majority of the Commission's annual  
budget, which has fluctuated between \$6.6  
million and almost \$8 million in recent  
years, is dedicated to the challenged  
expressive activity.

491 F.3d at 1006-1007. The Ninth Circuit then describes federal  
regulation of pistachios:

In 2004, the United States Secretary of  
Agriculture issued a marketing order for  
California pistachios under the Agricultural  
Marketing Agreement Act of 1937 ..., 7 U.S.C.  
§ 601 et seq. See 7 C.F.R. § 983 (the  
'Marketing Order'). The Marketing Order  
regulates two broad areas of the pistachio  
industry: aflatoxin levels and minimum  
quality levels. *Id.* § 938.38-39. The  
Marketing Order makes no mention of

1 promotion, marketing, advertising, research,  
2 government relations or other potential  
3 expressive activity to be carried out by the  
4 administrative committee established by the  
5 federal regulations. The committee may  
6 'deliberate, consult, cooperate and exchange  
7 information with the California Pistachio  
8 Commission.' 7 C.F.R. § 983.71.

9 *Id.*, at 1007.

10 Based on the Supreme Court's decision in *Johanns*, the Ninth  
11 Circuit ruled that Paramount had not shown a likelihood of  
12 success on the merits of the First Amendment claim:

13 The framework of statutes and regulations  
14 governing the Pistachio Commission and its  
15 activities essentially mirrors the scheme  
16 addressed in *Johanns*. Although the state of  
17 California may, in practice, exercise less  
18 oversight over the Pistachio Commission than  
19 the Secretary of Agriculture exercises over  
20 the Beef Board, on the record developed thus  
21 far, that distinction is not enough to  
22 differentiate the activities of the Pistachio  
23 Commission from those of the Beef Board.

24 The structure of the Pistachio Commission and  
25 its relationship to the State of California  
26 is nearly identical in design to that of the  
Beef Board at issue in *Johanns*. The  
Pistachio Commission consists of nine  
members, of which eight are elected by  
industry members and one is appointed by the  
Secretary of the CDFA.<sup>4</sup> The Secretary must  
also concur in any nomination and election  
procedures adopted by the Pistachio  
Commission. Pistachio Act § 69069.

27 The Pistachio Commission is directed to  
28 'promote the sale of pistachios by  
29 advertising and other promotional means,' *id.*  
30 § 69051(i), while the Beef Board is tasked  
31 with 'carrying out a coordinated program of  
32 promotion and research designed to strengthen  
33 the beef industry's position in the  
34 marketplace and to maintain and expand  
35 domestic and foreign markets and uses for  
36 been and beef products.' 7 U.S.C. § 2901(b).

1 The Secretary of the CDFA is authorized to  
2 attend and participate in the meetings where  
3 promotional activities are planned, Pistachio  
4 Act § 69041, just as the Secretary of  
5 Agriculture or his designee may attend the  
6 meetings where the Beef Board develops  
7 marketing plans, see 7 C.F.R. § 1260.168(h).  
8 As a practical matter, the Secretary of the  
9 CDFA or his representative routinely attends  
10 Commission meetings.

11 The Secretary of Agriculture approves the  
12 Beef Board's detailed plans for promotional  
13 or marketing activities. See 7 C.F.R. §§  
14 1260.150(f)-(g) & 1260.169. Similarly, the  
15 Pistachio Commission must submit to the  
16 Secretary of the CDFA, for his concurrence,  
17 'an annual statement of contemplated  
18 activities authorized [by the Pistachio Act],  
19 including advertising, promotion, marketing  
20 research, and production research.'  
21 Pistachio Act § 69051(q).

22 Although there is no provision in the  
23 Pistachio Act allowing the Secretary of the  
24 CDFA to remove members of the Pistachio  
25 Commission, compare *Johanns*, 544 U.S. at 563  
26 ..., the Pistachio Act authorizes the  
Secretary of the CDFA to 'correct or cease  
any existing activity or function that is  
determined by the secretary not to be in the  
public interest or in violation of [the  
Pistachio Act].' Pistachio Act § 69032.  
And, the Secretary may suspend or discharge  
the Commission's president if he has engaged  
in any conduct that the Secretary determines  
is not in the public interest. *Id.* §  
69051(d).

Other factors also demonstrate the  
Secretary's control over the Commission. For  
example, growers dissatisfied with any  
Commission activity may file a grievance,  
which can be directly appealed to the  
Secretary. *Id.* § 69092. The Secretary also  
must approve the Commission's annual budget  
before the Commission may disburse funds, *id.*  
§ 69051(p), and he may conduct a separate  
fiscal compliance audit whenever he deems  
such an audit is necessary, *id.* § 69051(h).  
Given the similarities to *Johanns* and the

1 level of control vested in the Secretary,  
2 Paramount has not yet demonstrated that the  
3 Pistachio Commission should be classified as  
4 a nongovernmental entity.

5 Paramount argues that *Johanns* should not  
6 apply here because, in practice, the  
7 Secretary of the CDFA exercises 'no control'  
8 over the Pistachio Commission's promotional  
9 and marketing activities. In *Johanns*, the  
10 Court held that the speech at issue in that  
11 case more than met the requirements for  
12 qualifying as government speech. See 544  
13 U.S. at 563 ... (holding that 'the beef  
14 advertisements here are subject to political  
15 safeguards more than adequate to set them  
16 apart from private messages'). However,  
17 *Johanns* did not set a floor or define minimum  
18 requirements. *Id.*

19 At this stage of the proceedings, we cannot  
20 say that Paramount is likely to overcome the  
21 barrier of *Johanns*. Paramount has not made a  
22 sufficient showing that the Secretary of the  
23 CDFA exercises inadequate oversight over the  
24 activities of the Commission. To be sure,  
25 the Secretary of the CDFA exercises less  
26 control over the Pistachio Commission than  
the Secretary of Agriculture exercised over  
the Beef Board. Nonetheless, the marketing  
and promotional plans submitted to the CDFA  
include a significant amount of detail. For  
example, they include a general description  
of the advertisements, detail the themes to  
be emphasized, the actors to be used, the  
demographics to be targeted, and the media to  
be employed. Last year's budget noted that  
the 'proposed advertising campaign will  
feature three generations of [Jane] Seymour's  
family ... making the connection that heart  
disease is not a discriminator of age, and  
that California pistachios can be an  
important part of lifetime heart health.'  
The proposal describes the specific magazines  
in which the advertisements will run, notes  
the approximate timing of their publication  
(in February, to coincide with the Super  
Bowl, for example), and often includes  
specific words and imagery to be used. The  
overall budget also includes specific line-  
item budgets for promotional, advertising,

1 marketing, and research activities, a report  
2 from a retained private advertising agency  
3 that discusses the advertisements generally  
4 and each selected publication and promotional  
5 activity specifically, and a 15-page overview  
6 of the entire public relations strategy,  
7 including advertising, marketing, and  
8 promotions.

9 Although the Secretary has not rejected or  
10 edited proposals, or taken a particularly  
11 active role in meetings, this passivity is  
12 not an indication that the government cannot  
13 exercise authority. See *Johanns*, 544 U.S. at  
14 560 ... (focusing on effective control). The  
15 Secretary, through his staff, retains  
16 authority to control both the activities and  
17 the message. The fact that he has not played  
18 an active role cannot be equated with  
19 abdication of his role. Just as '[t]he  
20 Secretary of Agriculture does not write [the  
21 copy of the beef advertisements] himself' for  
22 the Beef Board, neither should such oversight  
23 be required for the California scheme to pass  
24 constitutional muster. *Id.*

25 We acknowledge that there are differences in  
26 actual oversight between the beef scheme and  
the pistachio scheme, but these factual  
differences are legally insufficient to  
justify the injunction. To draw a line  
between these two approaches to oversight  
risks micro-managing legislative and  
regulatory schemes, a task federal courts are  
ill-equipped to undertake. 'The message set  
out in the [pistachio] promotions is from  
beginning to end the message established' by  
the state government. *Id.*<sup>5</sup>

...

<sup>4</sup>Paramount makes much of the fact that in  
*Johanns*, the entire Beef Board was  
'appointed' by the Secretary of Agriculture,  
but only one member of the Pistachio  
Commission is 'appointed' by the Secretary of  
the CDFA. This distinction, while accurate,  
is somewhat exaggerated. The Beef Board is  
appointed by the Secretary of Agriculture  
from among a list of candidates nominated by  
the trade association. 7 C.F.R. §

1 1260.141(b). Both boards are dominated by  
2 industry appointees, not independent third  
party board members.

3 <sup>5</sup>Because we rest our analysis on *Johanns*, we  
4 decline to reach the district court's  
resolution of the compelled speech challenge  
5 under *Glickman* and *United Foods*.

6 491 F.3d at 1010-1012.

7 3. Message Mandated by California Legislature.

8 The California Table Grape Commission was established and is  
9 regulated pursuant to Division 22 (Marketing Advisory and  
10 Promotional Agency Laws) of the California Food & Agriculture  
Code.

11 California Food & Agriculture Code § 63901, as enacted in  
12 1995, is the California Legislature's statement of purpose:

13 The Legislature hereby finds and declares  
14 that the commissions and councils established  
15 pursuant to this division advance the  
interests of the State of California in that  
16 they do all of the following:

17 (a) Reflect a continuing commitment on the  
part of the State of California to its  
18 agricultural and seafood industries. The  
state's agricultural and seafood industries  
19 are a source of substantial employment for  
the state's citizens, produce needed tax  
20 revenues for the support of state and local  
government, encourage responsible stewardship  
21 of valuable land and marine resources, and  
produce substantial necessary food and fiber  
22 for the state, nation, and world, at  
reasonable costs.

23 (b) Represent a policy of support for self-  
24 help, public-private partnerships. These  
commissions and councils are particularly  
25 important for the continued success of  
California agriculture and seafood because of  
26 the unique nature of agricultural and seafood  
production, which tends to be decentralized

1 with many small entities operating in diverse  
2 locations.

3 (c) Are intended to provide benefit to the  
4 entire industry and all of the people of this  
5 state. The commissions and councils are not  
6 enacted, and are not intended to produce  
7 measurable benefit, on an individual basis,  
8 and their successes should be evaluated  
9 accordingly by analyzing the extent to which  
10 the commissions and councils have improved  
11 the overall conditions for the particular  
12 commodity subject to the commission's or  
13 council's jurisdiction.

14 (d) Are intended to enhance the image of  
15 California agricultural and seafood products  
16 to increase the overall demand for these  
17 commodities. In this fashion, the  
18 Legislature intends that the commissions and  
19 councils operate primarily for the purpose of  
20 creating a more receptive environment for the  
21 commodity and for the individual efforts of  
22 those persons in the industry, and thereby  
23 compliment those individual, targeted, and  
24 specific activities.

25 (e) Are now more necessary and valuable than  
26 ever before as a result of declining support  
from the federal government and the  
increasing competition attributable to the  
global marketplace.

Section 63901 was amended in 2001. As amended, Section 63901  
sets forth the California Legislature's declaration:

[T]he agricultural and seafood industries are  
vitally important elements of the state's  
economy and are supported by state  
established commissions and councils  
specified in this division that are mandated  
to enhance and preserve the economic  
interests of the State of California and are  
intended to do all of the following:

(a) Implement public policy through their  
expressive conduct. The programs conducted  
by these commissions and councils are among  
the broad range of state-mandated regulatory  
programs that are funded by the public



1 through user fees assessed in accordance with  
2 each person's relationship to a particular  
program.

3 (b) Reflect a continuing commitment by the  
4 State of California to its agricultural and  
seafood industries that are integral to its  
5 economy. These industries are a source of  
substantial employment for the state's  
6 citizens, produce needed tax revenues for the  
support of state and local government,  
7 encourage responsible stewardship of valuable  
land and marine resources, and produce  
8 substantial necessary food and fiber for the  
state, nation, and world.

9 (c) Represent a policy of support for persons  
engaged in the agricultural and seafood  
10 industries, which are critically important  
elements of the state's economy. These  
11 commissions and councils are particularly  
important for the continued success of  
12 California's unique agricultural and seafood  
industries which tend to be decentralized  
13 with many small entities operating in diverse  
locations.

14 (d) Provide benefit to the entire industry  
and all of the people of this state. The  
15 commissions and councils are not enacted, and  
are not intended to produce measurable  
16 benefit, on an individual basis, and their  
successes should be evaluated by analyzing  
17 the extent to which they have improved the  
overall conditions for the particular  
18 commodity subject to the commission's or  
council's jurisdiction with resulting benefit  
19 to the overall economy of the state.

20 (e) Enhance the image of California  
21 agricultural and seafood products to increase  
the overall demand for these commodities. In  
22 this fashion, the Legislature intends that  
the commissions and councils operate  
23 primarily for the purpose of creating a more  
receptive environment for the commodity and  
24 for the individual efforts of those persons  
in the industry, and thereby compliment  
25 individual, targeted, and specific  
activities.



1 Section 63901.3, enacted in 2001, provides:

2 The Legislature further finds and declares  
3 that the commission and council activities  
4 are essential to the goals and interests of  
the State of California that include, but are  
not limited to, all of the following:

5 (a) Research, including, but not limited to,  
6 production research, food safety research,  
7 marketing research and trends analysis, and  
research relating to crop protection and  
production materials.

8 (b) Elimination of tariff and nontariff trade  
9 barriers.

10 (c) Consumer education relating to the health  
11 and other benefits of using and consuming  
12 agricultural and seafood products.

13 (d) Consumer education relating to  
14 environmental protection and conservation.

15 (e) Demand-side regulation that stabilizes  
16 the flow of product to market through  
17 promotion.

18 (f) Analysis of the impact of federal, state  
19 and foreign regulation.

20 (g) Cooperative crisis resolution that  
21 impacts public health and safety and the  
22 continued stability of the industry.

23 (h) Participation with state and federal  
24 agencies in negotiating with other  
25 governments relating to market access issues  
26 such as phytosanitary issues, shipping  
protocols, crop protection residues,  
packaging, labeling, and other issues raised  
by countries imposing trade barriers on the  
import of agricultural and seafood products  
into their markets.

(i) Industry self-regulation to establish and  
maintain grade, size and maturity standards  
and to stabilize the flow of product to  
market.

26 In Section 63901.4, enacted in 2001, the Legislature:

1 [F]urther finds and declares that mandated  
2 cooperative efforts engaged in by the  
3 commissions and councils have proven to be  
4 effective methods to avoid economic waste and  
5 maintain stable agricultural markets. These  
6 cooperative efforts are intended to work  
7 subject to, and together with, the  
8 constraints placed on the agricultural  
9 industry by state and federal statutes and  
10 regulations and international restrictions.

11 Section 63902, amended in 2001, provides:

12 In addition to any specific provisions  
13 regarding grievance procedures, and  
14 consistent with the nature of the commissions  
15 and councils established pursuant to Part 2  
16 (commencing with Section 64001) and the  
17 desire to resolve conflicts in the most  
18 timely and cost-effective manner, any person  
19 subject to this division shall file a  
20 grievance with the appropriate commission or  
21 council, and exhaust all administrative  
22 remedies prior to the initiation of any  
23 litigation based on a claim, express or  
24 implied, that the activities undertaken by  
25 the commission or council do not directly or  
26 materially advance the interests of the State  
of California as set forth in this part.

16 Section 63903, enacted in 1997, provides that, "[i]n addition to  
17 the authority granted to any commission by Part 2 (commencing  
18 with Section 64001), those commissions may commence or  
19 participate in administrative and civil actions relative to the  
20 activities of the commission." Pursuant to Section 63904,  
21 enacted in 1998, "[t]he Legislature finds and declares that the  
22 councils and commissions operating pursuant to this division are  
23 duly constituted authorities of this state for purposes of  
24 subdivision (i) of Section 610 of Title 7 of the United States  
25 Code." 7 U.S.C. § 610(i) provides:

26 The Secretary of Agriculture upon the request

1 of the duly constituted authorities of any  
2 State is directed, in order to effectuate the  
3 declared policy of this chapter and in order  
4 to obtain uniformity in the formulation,  
5 administration, and enforcement of Federal  
6 and State programs relating to the regulation  
7 of the handling of agricultural commodities  
8 or products thereof, to confer with and hold  
9 joint hearings with the duly constituted  
10 authorities of any State, and is authorized  
11 to cooperate with such authorities; to accept  
12 and utilize, with the consent of the State,  
13 such State and local officers and employees  
14 as may be necessary; to avail himself of the  
15 records and facilities of such authorities;  
16 to issue orders (subject to the provisions of  
17 section 608c of this title) complementary to  
18 orders or other regulations issued by such  
19 authorities; and to make available to such  
20 State authorities the records and facilities  
21 of the Department of Agriculture: *Provided,*  
22 That information furnished to the Secretary  
23 of Agriculture pursuant to section 608d(1) of  
24 this title shall be made available only to  
25 the extent that such information is relevant  
26 to transactions within the regulatory  
jurisdiction of such authorities that the  
information so furnished shall be kept  
confidential by them in a manner similar to  
that required of Federal officers and  
employees under the provisions of section  
608d(2) of this title.

Section 63905, enacted in 2001 and amended in 2006, provides:

(a) Any commission or council may petition  
the secretary to adopt or administer any  
activity authorized pursuant to the  
California Marketing Act of 1937 (Chapter 1  
(commencing with Section 58601) of Part 2 of  
Division 21) relating to the commodity that  
is covered by any commission or council.  
Adoption and administration of the activity  
by any commission or council shall be in  
accordance with the fact.

(b) Any commission or council may petition  
the secretary to administer any activity that  
the commission or council is authorized to  
engage in, and that is authorized pursuant to  
the California Marketing Act of 1937 (Chapter

1 1 (commencing with Section 58601) of Part 2  
2 of Division 21), relating to the commodity  
3 that is covered by any commission or council.  
4 If the secretary accepts the petition, the  
5 commission or council shall reimburse the  
6 secretary for his or her actual cost for  
7 administering the activity. The secretary  
8 may waive referendum under the act, if  
9 following a hearing, the secretary determines  
10 that there is no substantial question of  
11 opposition to doing so among affected  
12 assessment payers. Administration of the  
13 activity by the secretary shall be in  
14 accordance with the act.

(c) As determined by the secretary, the  
governing body of the commission or council  
may serve as the advisory board with respect  
to any activity recommended and approved  
pursuant to this section.

(d) As used in this section, 'substantial  
question of opposition' means opposition to  
the substance of the petition among currently  
affected assessment payers, and is not  
intended to mean a particular number of  
assessment payers.

15 The 2001 amendments and enactments were part of AB 1612.  
16 The Report of the California Senate Agriculture and Water  
17 Resources Committee explains the reasons for the 2001 amendments  
18 and enactments:

19 Existing law ... allows for the establishment  
20 of commissions and councils to advance the  
21 interests of California agriculture and  
22 seafood. The Legislature declares that these  
23 commissions and councils are established to  
24 reflect a commitment to California  
25 agriculture and seafood industries, represent  
26 a policy of support for self-help and public-  
private partnerships, provide a benefit to  
the entire industry and all Californians, and  
are intended to enhance the image of  
California agriculture and seafood products.  
Each commission and council is established  
and administered according to its own  
statutory guidelines. According to

1 information provided by the California  
2 Department of Food and Agriculture,  
3 California has 51 advisory boards, councils  
4 and commissions.

5 A series of cases and court rulings have  
6 clouded marketing orders, commissions, and  
7 councils [sic] legal status based on the  
8 First Amendment. In 1996, The [sic] United  
9 States Supreme Court held that the First  
10 Amendment was not violated when agricultural  
11 marketing orders, as part of a larger  
12 regulatory scheme, required fruit producers  
13 of California tree fruit to pay assessments  
14 for product advertising (Glickman v. Wileman  
15 Brothers and Elliott, 521 U.S. 457). In  
16 [sic] June 25, 2001, the United States  
17 Supreme Court found that a federal marketing  
18 order covering generic mushroom promotion was  
19 a violation of the First Amendment (United  
20 States etal. [sic] v. United Foods, Inc., No.  
21 00276, Decided June 25, 2001). The United  
22 Foods court found that no corollary to  
23 Glickmans cooperative marketing structure  
24 existed. The promotion activities the  
25 opponent was required to support was not  
26 directly associated with other regulatory  
activities as required in Glickman.

Many legal analysts believe the result of  
these cases is a spectrum. On one end is  
acceptable compelled speech if it is  
associated with a regulatory program. On the  
other end of the spectrum are programs that  
compel speech that are not associated with a  
comprehensive regulatory scheme. At this  
point, there is not a bright line determining  
where the appropriate level of regulation or  
identifying the necessary activities required  
for these programs.

#### PROPOSED LAW

This measure states that the agriculture and  
seafood industries are vitally important  
elements of the state's economy and are  
supported by state established commissions  
and councils mandated to enhance and preserve  
the economic interests of California.

This bill contains findings and declarations

1       stating that commissions and councils  
2       implement public policy through their  
3       expressive conduct and these programs are  
4       among the broad range of state mandated  
5       regulatory programs that are funded by the  
6       public generally through user fees assessed  
7       in accordance with each persons [sic]  
8       relationship to a particular program.

9       The bill amends several existing findings  
10      with clarifying language and further  
11      articulating the importance of these programs  
12      to the state's economy.

13      The bill states additional findings  
14      concerning these programs importance to  
15      California's interests and that these  
16      programs activities include but are not  
17      limited to the following:

18      Research  
19      Elimination of tariff and non tariff trade  
20      barriers  
21      Consumer education relating to health and  
22      other benefits of using and consuming these  
23      products  
24      Demand side regulation  
25      Analysis of government regulation  
26      Cooperative crisis resolution  
27      Participation in negotiations with other  
28      governments relating to market access issues  
29      Industry self regulation to establish and  
30      maintain grade, size, and maturity standards  
31      and to stabilize the flow of product.

32      The final finding declares that mandated  
33      cooperative efforts engaged in by the  
34      commissions and councils are the best methods  
35      to avoid economic waste and maintain stable  
36      markets and work in cooperation with  
37      government regulation.

38      ...

39      The bill allows commissions and councils to  
40      petition the Secretary to engage in any  
41      activity authorized by the California  
42      Marketing Act of 1937. This bill would  
43      require a successful referendum according to  
44      the statutory requirements of the Marketing  
45      Act ... and approval by the Secretary ...

1 before the new activity could be implemented

2 ....

3 ...

4 COMMENTS

5 1. According to the sponsor, the reason the  
6 additions to the declarations and findings  
7 are included is to strengthen commissions and  
8 councils directives and to clarify their  
9 importance and duties. By strengthening the  
10 findings and declarations and expressly  
11 stating many of the various important  
12 activities in which these programs  
13 participate, it clarifies these programs  
14 importance to California's economy and  
15 interest and how integral these programs are  
16 to other government regulatory and non-  
17 regulatory activities.

18 2. This bill expands the authorized powers  
19 of the various commissions and councils which  
20 have been established to promote California  
21 agriculture and seafood. Under current law,  
22 each commission or council is allowed to  
23 engage in only those activities authorized by  
24 its specific statutory guidelines. This  
25 measure would allow each commission and  
26 council to engage in any of the activities  
included in the California Marketing Act of  
1937.

1 Although this bill does expand the scope  
2 of activities that can be undertaken by  
3 commissions and councils, the increased  
4 activities can only be initiated after a  
5 successful referendum of affected members  
6 according to the requirements of the act.  
7 Furthermore, the Secretary still retains the  
8 authority to approve marketing programs and  
9 activities recommended by the governing  
10 boards of the commissions and councils.

11 ...

12 The Commission notes that § 65572(h) empowers the Commission  
13 "[t]o promote the sale of fresh grapes by advertising and other  
14 similar means for the purpose of maintaining and expanding

1 present markets and creating new and larger intrastate,  
2 interstate and foreign markets for fresh grapes; to educate and  
3 instruct the public with respect to fresh grapes; and the uses  
4 and time to use the several varieties, and the healthful  
5 properties and dietetic value of fresh grapes". Section 65572(i)  
6 empowers the Commission, in its discretion, "to educate and  
7 instruct the wholesale and retail trade with respect to proper  
8 methods of handling and selling fresh grapes; to arrange for the  
9 performance of dealer service work providing display and other  
10 promotional materials; to make market surveys and analyses; and  
11 to present facts to and negotiate with state, federal and foreign  
12 agencies on matters which affect the marketing and distribution  
13 of fresh grapes; and to undertake any other similar activities  
14 which the commission may determine appropriate for the  
15 maintenance and expansion of present markets and the creation of  
16 new and larger markets for fresh grapes".

17 The Commission argues that Plaintiffs do not dispute that  
18 the Commission has followed these statutory directives and that  
19 Plaintiffs, having dismissed with prejudice their challenges to  
20 particular activities conducted by the Commission, raise only a  
21 facial challenge to the Ketchum Act as a whole. The Commission  
22 asserts: "[I]f Plaintiffs challenge only the overall message of  
23 the program - a message that is defined by statute - Plaintiffs  
24 cannot plausibly claim that the speech they challenge is not  
25 government speech." Therefore, the Commission contends, the  
26 level of oversight of the Commission's activities by the CDFA is



1 irrelevant.

2 In contending that Plaintiffs raise only a facial challenge  
3 to the Ketchum Act, the Commission relies on its Statement of  
4 Undisputed Facts:

5 CUF No. 203: Plaintiff Susan Neill Company does not object  
6 to the message of the Commission's consumer education, research,  
7 or market access activities. Its only objection is that it does  
8 not want to fund these activities. See Neill Dep. 62:1-66:3,,  
9 83:24-84:12, 96:5-10, May 17 2004. To the extent The Susan Neill  
10 Company objects to any of the Commission's messages, it is  
11 principally an objection to the advertising of all California  
12 table grapes as opposed to Lucas Brothers' table grapes. See *if*.  
13 at 33:2-34:12.

14 Plaintiffs' dispute CUF No. 203, asserting in pertinent  
15 part:

16 [T]he Susan Neill Company and Lucas Bros.  
17 believe that the millions of dollars spent by  
18 the Commission on generic advertising hurts a  
19 company like Plaintiffs to urge buyers to buy  
20 Plaintiffs' product not 'generic' table  
21 grapes produced in California and grown by  
22 others (response to interrogatory number 13,  
23 set number two, Exhibit 'I' to Boynton  
24 Declaration). Plaintiff [sic] contends that  
25 virtually everything that the Commission does  
26 is some form of speech-communication, the  
administration of same, as well as the  
salaries, benefits, travel expenses for  
speech/communication related activities.  
'That obviously would include bird  
sanctuaries, scholarship funds, dinners,  
charter planes, lavish parties, limousines,  
payoffs to buyers of table grapes, and when  
these activities cannot be quantified as  
reducing demand for Plaintiffs' table grapes,  
when the Commission members are part of this

1       extravagance paid for by Plaintiffs, and the  
2       Commission members, who are Plaintiffs'  
3       competitors are "high-styling" with buyers of  
4       table grapes, that could have an indirect  
5       reduction of demand for Plaintiffs' table  
6       grapes, as well as the fact that since  
7       Plaintiffs are forced to fund such nonsense,  
8       it is less money that Plaintiffs have in  
9       promoting and selling its own table grapes.'  
10      Neill response to interrogatory number 14,  
11      set number 2. '[Neill and Lucas], stated in  
12      response to the previous interrogatory, does  
13      not seek the Commission's help with respect  
14      to any of Plaintiffs' farming operations,  
15      cultural methods, varieties, sales or  
16      promotion. Those would be actions on behalf  
17      of Plaintiff that showed that it does not  
18      want to be forced to associate with or  
19      financially support the Commission, its  
20      speech efforts, or its claims that it  
21      represents Plaintiff. Plaintiff has hired an  
22      attorney to represent it in this lawsuit  
23      against the Table Grape Commission and  
24      expended thousands of dollars for the  
25      attorney to contest the constitutionality and  
26      the legitimacy of the Commission. If  
27      Plaintiff had agreed with the Commission and  
28      its speech efforts, Plaintiff would not be  
29      pursuing this 8 year effort to have a court  
30      find that the Commission is unconstitutional.  
31      To reiterate, Plaintiff vehemently disagrees  
32      with being forced to associate with and  
33      financial support the Commission [sic], its  
34      speech efforts and its claim that the  
35      Commission represents Plaintiff.' (Neill's  
36      response to interrogatory number 16, set  
37      number 2). Neill and Lucas vehemently object  
38      to any and all expenditures and programs of  
39      the Commission. (Response to interrogatory  
40      number 17.) Lucas' Bros. objections were the  
41      same as Susan Neill's. (See Exhibit '2' to  
42      the Declaration of Boynton, Lucas Bros.'  
43      responses to interrogatories, set number two,  
44      numbers 7, 9, 12, 13, 15, and 16. [sic]

45      Defendant misstates the deposition testimony  
46      of Susan Neill (Exhibit '7' to the  
47      Declaration of Boynton (after explaining all  
48      of the things that the [sic] Susan Neill  
49      Company does to promote and advertise their  
50      product (Depo Transcript pages 19-25) Susan

1 Neill laid into the Commission program, and  
2 objects to the Commission engaging in  
3 consumer education, objects to it, does not  
4 believe it is necessary, believes it is a  
5 waste of Neill and Lucas money, the same for  
6 research, the same for export activities, and  
7 its more than just not wanting to pay the  
8 assessments, 'I do not want to be compelled  
9 to have to spend money on this when it does  
10 nothing for me, and I do not believe that it  
11 is useful.' (Depo transcript at 64) Neill  
12 also does not like the Commission message,  
13 she does not want to pay for it because it is  
14 not useful in selling their grapes, she does  
15 not like the scholarship program, the bird  
16 sanctuary donations, the chartered planes,  
the limousines, the 'big dinners and cash  
payoffs to buyers' (Depo at 65): 'I think  
that they're [Commission] just wasting money.  
I object to everything they do. \*\*\* I object  
to them spending my money to do it. I don't  
wish to contribute to that cause.' Depo at  
page 83, lines 3-16. When asked if there  
were any other objections that the [sic]  
Susan Neill Company had she stated 'I do not  
like their message. I don't like the  
Commission. I don't want to be associated  
with it. They're - I don't like to spend my  
money on it. I don't want to be compelled  
to.' Page 83, Depo transcript, lines 17-23.

CUF No. 204: Plaintiff Lucas Brothers does not object to the  
message of the Commission's trade management activities directed  
to retailers, phytonutrient research, or market access  
activities. Its only objection is that it could spend its  
assessment dollars more profitably. See Lucas Dep. 60:23-61:14;  
64:10-16; 65:19-66:5, May 17, 2005. To the extent Lucas Brothers  
objects to any of the Commission's messages, it is principally an  
objection to the advertising of all California table grapes as  
opposed to his table grapes. See *id.* at 58:14-22, 59:9-21.

Plaintiffs dispute CUF No. 204 on the same grounds as set

1 forth in connection with CUF No. 203. Plaintiffs add that the  
2 Commission misstates the deposition testimony of George Lucas:

3 Lucas objects to the Commission's  
4 advertising, he objects to the Commission's  
5 research, he objects to the Commission itself  
6 because it is made up of his competitors,  
7 Lucas believes that he could use the  
8 assessments much more profitably promoting  
9 and advertising his table grapes, he feels  
10 the same about the Commission's activities  
11 with respect to foreign markets, and he does  
12 not like the Commission's expenditures for  
13 extravagant things. Lucas Depo pages 60-66;  
14 Exhibit '8' to Declaration of Boynton.

15 CUF No. 206: Even though Delano Farms receives all of the  
16 reports and correspondence sent out by the Commission to growers  
17 explaining what the Commission is doing ..., Delano Farms has not  
18 raised any objection to the substance of any of the Commission's  
19 nonadvertising activities. See Middleton Dep. 35:5-18; 81:8-  
20 84:10, 93:25-94:10. To the extent Delano Farms objects to any of  
21 the Commission's messages, it is principally an objection to the  
22 advertising of all California table grapes as opposed to Delano  
23 Farms's table grapes. See *id.* 40:19-25.

24 Plaintiffs dispute CUF No. 206, referring to Delano Farms  
25 responses to the Commission's interrogatories, set no. 2:

26 After Delano Farms explained the substantial  
efforts it goes to in planting the best  
varieties and growing the best quality,  
wherein buyers are asking specifically for  
Delano Farms' grapes (responses to  
interrogatories 9 and 10), and also  
explaining the number of branded labels  
Delano Farms uses for its table grapes  
(response to interrogatory 2), as well as  
what its substantial sales force does in the  
procurement of buyers, sustaining and  
developing current buyers and for the

1 promotion of the company and its product, and  
2 the expenditure of countless hours, dollars  
3 and efforts developing and maintaining a  
4 relationship with prospective and current  
5 customers, and understanding their needs  
6 (answers to interrogatories 5 and 8), as well  
7 as planting of the newer varieties and  
8 significant quantity of the varieties in  
9 order to supply the major buyers (response to  
10 interrogatory 10), and the fact that Delano  
11 Farms is the industry leader in terms of  
12 acreage planted for one variety, and added to  
13 its customer list as a result of the superb  
14 quality and quantity (response to  
15 interrogatory 11), Delano explained at first  
16 that one of its objections to the Commission  
17 program by stating (response to interrogatory  
18 13) that 'Delano Farms believes that the  
19 Commission's advertising efforts, since those  
20 efforts are generic only, equating all table  
21 grapes produced by one variety to be  
22 "generic," fungible, and the same quality is  
23 absolutely worthless to Delano Farms in  
24 selling its product. Whether the  
25 Commission's advertising reduces demand is  
26 totally subjective, but Delano Farms believes  
that millions of dollars spent on generic  
advertising hurts a company like Delano which  
desires to urge buyer to buy Delano's  
product, not "generic" table grapes produced  
in California and grown by others.' (Response  
to interrogatory 13)

18 In response to interrogatory 16, Delano Farms  
19 responded: 'Delano, as stated in response to  
20 the previous interrogatories, does not seek  
21 the Commission's help with respect to any  
22 aspects of Delano Farms' farming operations,  
23 cultural methods, varieties, sales or  
24 promotion. Those would be actions on behalf  
25 of Delano that showed it does not want to be  
26 forced to associate with or financially  
support the Commission, its speech efforts or  
its claims that it represents Delano.  
(Response to interrogatory 16) In response to  
interrogatory 17 which [sic] they asked the  
question as to what funding of the  
Commission's activities Delano Farms  
contended constituted compelled speech in  
violation of the First Amendment, Delano  
Farms responded: 'Delano Farms contends that

1 virtually all funding activities of the Table  
2 Grape Commission are speech/communication  
3 related activities, so therefore requiring  
4 Delano to fund these speech related  
5 activities constitutes compelled speech, or  
6 compelled funding of speech. Those  
7 activities would include lobbying, promotion,  
8 consumer education, merchandising,  
9 advertising, promotion, research, salaries,  
10 travel and benefits of the employees to carry  
11 out the same, payments to attorneys, payments  
12 to lobbyists, donations, scholarships, the  
13 Commission's building, the Commission's  
14 meetings, and virtually every activity is  
15 communication, which is speech related  
16 activities.' (Response to interrogatory 18)

17 Citing only a selected portion of Jim  
18 Middleton's deposition transcript (Jim  
19 Middleton being the main director and  
20 shareholder of Delano Farms), Mr. Middleton  
21 objected to the Commission's activities far  
22 more that asserted by the Commission. Those  
23 selected portions of Middleton's deposition  
24 transcript is located as Exhibit '9' to the  
25 declaration of Boynton. Therein Mr.  
26 Middleton explained a letter that he sent out  
to table grape growers in January of 1997  
(Exhibit '21' to Middleton deposition  
transcript, a copy of which is attached  
hereto), explaining Delano Farms' position as  
to why the growers should vote out the  
Commission in the next referendum, and  
explaining all of the reasons ... Middleton  
testified that those were Delano Farms'  
objections then, and they would be currently  
the same objections now (2004 when he was  
deposed). In said letter, Delano Farms  
stated fully its position regarding the  
objections to the Commission, what it stands  
for, and how it is funded. Middleton was  
asked at his deposition whether his  
objections 'is simply to the mandatory nature  
of the payment to the Commission.' (Page 44  
of depo transcript) Middleton's response was:  
'We believe in democracy, and what you got  
here is a piece of socialism that doesn't  
work. And organizations that we belong to  
that are voluntary are always very effective.  
If they aren't, the members say, "see ya  
later." When you have to belong to

1 something, it becomes like the United States  
2 Department of Commerce. Pretty soon, it is  
3 just a big unwieldy thing. And that is what  
4 has happened here.' He later stated that the  
5 biggest objection is the structure of the  
6 Commission and the mandatory nature of it.  
7 (Depo transcript at 44)

8 Therefore, the Commission's assertion that  
9 Delano Farms' only objection is being  
10 required to pay the assessment is absolutely  
11 false, and while it is certainly one of the  
12 reasons, the main reason is the socialistic  
13 nature of the Commission.

14 As the Commission contends, Plaintiffs' objections to the  
15 Commissions Statements of Undisputed Fact attack "the general  
16 message promoting all California table grapes, as opposed to  
17 grapes from a particular grower/shipper, that Plaintiffs attack -  
18 to the extent they attack a message delivered by the Commission  
19 at all." Plaintiffs have raised no objection to the particular  
20 messages created by the Commission itself and do not dispute that  
21 the Commission has adhered to the Legislature's instructions.

22 Plaintiffs further oppose this aspect of the Commission's  
23 motion by asserting that the "Legislature setting the 'overall  
24 message' - forty years ago - is stated only in the loosest,  
25 vaguest and most general of terms that the private board of  
26 competitors that make up the Commission was to promote the sale  
of fresh grapes and to educate the public with respect to fresh  
grapes."

Plaintiffs cite several Supreme Court cases which they  
describe as involving "federal or state regulations dictating  
what must be said, written or broadcast" and that "[t]hey were



1 not government speech".

2 Plaintiffs cite *Thompson v. Western States Medical Center*,  
3 535 U.S. 357 (2002), in which the Supreme Court held that the  
4 prohibitions in the Food and Drug Administration Modernization  
5 Act of 1997 on soliciting prescriptions for, and advertising,  
6 compounded drugs amount to unconstitutional restrictions on  
7 commercial speech under the *Central Hudson* test; *Rubin v. Coors*  
8 *Brewing Co.*, 514 U.S. 476 (1995), wherein the Supreme Court held  
9 that § 5(e)(2) of the Federal Alcohol Administration Act,  
10 prohibiting beer labels from displaying alcohol content violates  
11 the First Amendment's protection of commercial speech under the  
12 *Central Hudson* test; *Riley v. National Federation of the Blind of*  
13 *North Carolina, Inc.*, 487 U.S. 781 (1988), wherein the Supreme  
14 Court held that the North Carolina Charitable Solicitations Act,  
15 defining reasonable fees that a professional fundraiser may  
16 charge, providing that the professional fundraiser must disclose  
17 to potential donors the average percentage of gross receipts  
18 actually turned over to the charity, and providing that  
19 professional fundraisers may not solicit without an approved  
20 license, while volunteers may solicit upon submission of a  
21 license application, unconstitutionally infringed on freedom of  
22 speech; *Pacific Gas & Electric Co. v. Public Utilities Commission*  
23 *of California*, 475 U.S. 1 (1986), in which the Supreme Court held  
24 that the PUC's ruling that envelope space in its monthly billing  
25 statements that PG&E had used to disseminate a newsletter that  
26 contained political editorials, feature stories on matters of



1 public interest, tips on energy conservation and information  
2 about utility services and bills was extra space and the  
3 ratepayers' property and permitted a group known as Toward  
4 Utility Rate Normalization to use the newsletter to raise funds  
5 and communicate with ratepayers with no limitation, except to  
6 state that its messages were not those of PG&E, impermissibly  
7 infringed on PG&E's First Amendment right not to help spread a  
8 message with which it disagreed; and *Miami Herald Publishing Co.*  
9 *v. Tornillo*, 418 U.S. 241 (1974), where the Supreme Court held  
10 that Florida's "right of reply" statute granting a political  
11 candidate a right to equal space to answer criticism and attacks  
12 on his record by a newspaper and making it a misdemeanor for the  
13 newspaper to fail to comply violates the First Amendment's  
14 guarantee of a free press.

15 Plaintiffs only provide the citations and do not discuss the  
16 applicability of the holdings of these decisions or how any of  
17 these cases involves the issue of "government speech" nor  
18 compelled subsidies in the context of government speech.  
19 Plaintiffs further argue that the decision in *Johanns* was not  
20 that Congress set the overall message "because of the absolute  
21 weight the court expressly placed over the amount and degree of  
22 the government's officious control over everything that was  
23 expressed to the public or concocted by the Beef Board."

24 It cannot be disputed that the Commission's programs are  
25 mandated by California statutes to implement and further the  
26 State's economic and consumer protection purposes for the table

1 grape industry as declared by the California legislature.

2 4. Commission is a Governmental Entity.

3 The Commission asserts that, even if it were necessary to  
4 show that the manner in which the Commission conveys the  
5 Legislature's messages is "effectively controlled" by a  
6 governmental entity other than the Legislature, that test is  
7 satisfied here because the Commission itself is a "governmental  
8 entity" as a matter of California law. The Commission relies on  
9 *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995),  
10 to define what entities are considered part of the government for  
11 purposes of the First Amendment.

12 In *Lebron*, Lebron created billboard displays that commented  
13 on public issues and filed suit claiming that the National  
14 Railroad Passenger Corporation (Amtrak) had violated his First  
15 Amendment rights by rejecting a display for an Amtrak billboard  
16 because of its political nature. The Supreme Court held:

17 [W]here, as here, the Government creates a  
18 corporation by special law, for the  
19 furtherance of governmental objectives, and  
20 retains for itself permanent authority to  
21 appoint a majority of the directors of that  
22 corporation, the corporation is part of the  
23 Government for purposes of the First  
24 Amendment.

25 513 U.S. at 400.

26 The Commission contends that the Supreme Court's decision in  
27 *Keller v. State Bar of California*, 496 U.S. 1 (1990), that the  
28 State Bar is not a government entity, is not controlling on this  
29 issue because 16 of the 22 members of the Board of Governors are

1 directly elected by State Bar members, while, under the Ketchum  
2 Act, the Secretary of the CDFA appoints the entire Commission.

3 In *Keller*, the Supreme Court addressed whether the  
4 California State Bar is a governmental agency for purposes of the  
5 First Amendment under the United States Constitution. In ruling  
6 that it was not, the Supreme Court held:

7 Of course the Supreme Court of California is  
8 the final authority on the 'governmental'  
9 status of the State Bar of California for  
10 purposes of state law. But its determination  
11 that respondent is a 'government agency,' and  
12 therefore entitled to the treatment accorded  
13 a governor, a mayor, or a state tax  
14 commission, for instance, is not binding on  
15 us when such a determination is essential to  
16 the decision of a federal question. The  
17 State Bar of California is a good deal  
18 different from most other entities that would  
19 be regarded in common parlance as  
20 'governmental agencies.' Its principal  
21 funding comes, not from appropriations made  
22 to it by the legislature, but from dues  
23 levied on its members by the board of  
24 governors. Only lawyers admitted to practice  
25 in the State of California are members of the  
26 State Bar, and all ... lawyers admitted to  
practice in the State must be members.  
Respondent undoubtedly performs important and  
valuable services for the States by way of  
governance of the profession, but those  
services are essentially advisory in nature.  
The State Bar does not admit anyone to the  
practice of law, it does not finally disbar  
or suspend anyone, and it does not ultimately  
establish ethical codes of conduct. All of  
those functions are reserved by California  
law to the State Supreme Court ....

23 There is, by contrast, a substantial analogy  
24 between the relationship of the State Bar and  
25 its members, on the one hand, and the  
26 relationship of employee unions and their  
members, on the other. The reason behind the  
legislative enactment of 'agency-shop' laws  
is to prevent 'free riders' - those who

1 receive the benefit of union negotiation with  
2 their employers, but who do not choose to  
3 join the union and pay their dues - from  
4 avoiding their fair share of the cost of a  
5 process from which they benefit. The members  
6 of the State Bar concedely do not benefit as  
7 directly from its activities as do employees  
8 from union negotiations with management, but  
9 the position of organized bars has generally  
10 been that they prefer a large measure of  
11 self-regulation to regulation conducted by a  
12 government body which has little or no  
13 connection with the profession. The plan  
14 established by California for the regulation  
15 of the profession is for recommendations as  
16 to admission to practice, the disciplining of  
17 lawyers, codes of conduct, and the like to be  
18 made to the courts or the legislature by the  
19 organized bar. It is entirely appropriate  
20 that all of the lawyers who derive benefit  
21 from the unique status of being among those  
22 admitted to practice before the courts should  
23 be called upon to pay a fair share of the  
24 cost of the professional involvement in this  
25 effort.

14 But the very specialized characteristics of  
15 the State Bar of California discussed above  
16 served to distinguish it from the role of the  
17 typical government official or agency.  
18 Government officials are expected as part of  
19 the democratic process to represent and  
20 espouse the views of a majority of their  
21 constituents. With countless advocates  
22 outside of the government seeking to  
23 influence its policy, it would be ironic if  
24 those charged with making governmental  
25 decisions were not free to speak for  
26 themselves in the process. If every citizen  
were to have a right to insist that no one  
paid by public funds express a view with  
which he disagreed, debate of issues of great  
concern to the public would be limited to  
those in the private sector, and the process  
of government as we know it radically  
transformed. ...

25 The State Bar of California was created, not  
26 to participate in the general government of  
the State, but to provide specialized  
professional advice to those with the

1 ultimate responsibility of governing the  
2 legal profession. Its members and officers  
3 are such not because they are citizens or  
4 voters, but because they are lawyers. We  
5 think that these differences between the  
6 State Bar, on the one hand, and traditional  
7 government agencies and officials, on the  
8 other hand, render unavailing respondent's  
9 argument that it is not subject to the same  
10 constitutional rule with respect to the use  
11 of compulsory dues as are labor unions  
12 representing public and private employees.

13 496 U.S. at 11-13.

14 Relying on *Lebron*, the Commission contends that "the Court  
15 need not reach the issue decided in [*Johanns*] - whether the  
16 Commission is a non-governmental entity that is nonetheless  
17 'answerable' to a government official - because the State of  
18 California's creation and control over the Commission through the  
19 appointment of its members makes the Commission part of the  
20 government for purposes of the First Amendment." The Commission  
21 argues that it satisfies the *Lebron* test for a government entity  
22 for purposes of the First Amendment because the Commission was  
23 created as a corporation by the California Legislature, Cal. Food  
24 & Agric. Code §§ 65550-65551, to further governmental objectives,  
25 citing Cal. Food & Agric. Code § 65500(h) ("The production and  
26 marketing of grapes produces in California for fresh human  
consumption is declared to be affected with a public interest"  
and that the Ketchum Act was enacted "in the exercise of the  
police power of th[e] state.").

The Commission emphasizes that the Secretary of CFDA  
appoints every member of the Commission. See Cal. Food & Agric.

1 Code §§ 65500, 65556, 65563, 65566, 65575.1. Commission members  
2 are nominated for appointment by table grape producers through an  
3 election process and a government official, the Secretary of the  
4 CFDA, makes appointments to the Commission from these nominees.  
5 The Commission maintains that this appointment process is no  
6 different from that in *Lebron* where six of the corporation's  
7 eight externally selected members are appointed by the President  
8 with the advice and consent of the Senate, with the statute  
9 restricting the President's choices to persons suggested by  
10 certain organizations or persons with specified qualifications.  
11 *Lebron*, *id.* at 397-398. The Commission observes that members of  
12 the Commission may be removed by the Secretary of the CFDA. The  
13 Commission stresses that California Government Code § 11000(a)  
14 defines "state agency" to include commissions. Other California  
15 statutes treat commissions as state agencies, *i.e.*, Government  
16 Code § 11121(a) defines "state body" for purposes of the Bagley-  
17 Keene Open Meeting Act to include commissions created by statute;  
18 Government Code § 6252(f) defines "state agency" to include  
19 commissions for purposes of public record requirements;  
20 Government Code §§ 82048-82049 defines "state agency" to include  
21 commissions and "public officials" as "every member, officer,  
22 employee or consultant of a state ... agency" for purposes of the  
23 Political Reform Act of 1974. The Commission also refers to  
24 California Code of Civil Procedure § 995.220, providing that  
25 state agencies and public officials are not required to post a  
26 bond in a judicial proceeding.

1       The Commission argues that "[o]versight by a different  
2 government agency is not required for a governmental entity's  
3 speech to be considered government speech". The Commission  
4 contends that *Lebron* did not consider whether the government-  
5 appointed directors of Amtrak were subject to day-to-day  
6 oversight in concluding that Amtrak was a government entity.<sup>3</sup>

7       Plaintiffs respond that the fact that the Commission is a  
8 state agency under California law does not compel the conclusion  
9 that the Commission's program is "government speech". Noting  
10 that the Supreme Court in *Keller* was not bound by the state's  
11 determination of the governmental status of the State Bar for  
12 purposes of the First Amendment, Plaintiffs reiterate the Supreme  
13 Court's conclusion that the State Bar was not a governmental  
14 entity for First Amendment purposes because it received no  
15 financial support from the State and argue that *Johanns*, in  
16 finding government speech, distinguished *Keller*: "There the state  
17 bar's communicative activities to which the plaintiffs objected  
18 were not prescribed by law in their general outline and not  
19 developed under official government supervision." *Johanns, id.*,

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20  
21       <sup>3</sup>The Commission also cites *Rosenberger v. Rector and Visitors*  
22 *of University of Virginia*, 515 U.S. 819 (1995) and *Board of Regents*  
23 *of the University of Wisconsin System v. Southworth*, 529 U.S. 217  
24 (2000) and asserts that "the [Supreme] Court gave no indication in  
25 [those decisions] that speech of a public university would be  
26 government speech only if some other government agency exercised  
oversight over the university."

27       Neither *Rosenberger* nor *Southworth* are helpful as these cases  
do not involve or discuss the issue of "governmental entity." Both  
involve First Amendment protections to students who were compelled  
to pay fees to the universities to fund various activities.

1 544 U.S. at 562. Plaintiffs argue that the Commission's reliance  
2 on *Lebron* for the proposition that the Supreme Court treated  
3 Amtrak as part of the government for purposes of the First  
4 Amendment" is "extremely misleading":

5       The claim in *Lebron* was that the National  
6 Railroad Passenger Corp. contended it was not  
7 a government entity for purposes of affording  
8 free speech protection. If the court recalls  
9 Hornbook First Amendment law, the First  
10 Amendment only applies if the government is  
11 regulating or compelling speech, not a  
12 private party. The issue in *Lebron* was  
13 whether or not the National Railroad  
14 Passenger Corp. was a government entity for  
15 purposes of providing free speech protection  
16 to *Lebron* [sic] who wished to carry out  
17 advertising on the respondent's conveyances,  
18 and the court held that the National Railroad  
19 Passenger Corp. was enough of a government  
20 entity in order to provide free speech  
21 protection to *Lebron* [sic]: 'government  
22 speech' was never addressed and was never an  
23 issue in that case.

24       The Commission rejoins that Plaintiffs have not contested  
25 that two of *Lebron*'s key elements are satisfied; that the  
26 Commission was created by the California Legislature as a  
27 corporation to further governmental objectives and that a  
28 governmental official appoints and can remove members of the  
29 Commission. The Commission argues:

30       Plaintiffs incorrectly argue that *Lebron*'s  
31 holding applies only to situations where  
32 finding an entity to be governmental would  
33 prevent it from restricting First Amendment  
34 rights .... But Plaintiffs' one-sided theory  
35 - that government-created and controlled  
36 corporations are the government when they  
37 restrict private speech but not when they are  
38 the speaker - finds no basis in *Lebron*'s  
39 reasoning. In *Lebron*, the plaintiff raised  
40 two separate arguments why the First



1 Amendment applied to Amtrak: (1) that 'Amtrak  
2 is not a private entity but Government  
3 itself,' and (2) that the First Amendment  
4 constrained Amtrak even though it is a  
5 private entity because it is 'closely  
6 associated with federal entities.' 513 U.S.  
7 at 378-379. The Court, however, expressly  
8 declined to address the second, more sweeping  
9 rationale for applying the First Amendment -  
10 the rationale that Plaintiffs reference -  
11 because it found that Amtrak is itself the  
12 government for purposes of the First  
13 Amendment. See *id.* at 392, 400. It may be  
14 the case that the speech of a purely private  
15 entity - like the restaurant in *Burton v.*  
*Wilmington Parking Authority*, 365 U.S. 715  
(1961) - is not government speech even though  
the government is sufficiently involved with  
the private entity to render its conduct  
'state action.' But there is no reason to  
think that an entity that itself is 'part of  
the Government for purposes of the First  
Amendment,' *Lebron*, 513 U.S. at 400, is  
actually just part of the government when  
that conclusion benefits the plaintiffs and  
not when it benefits the government  
corporation. Plaintiffs do not even attempt  
to articulate a rationale that ends-driven  
result.

16 In response to Plaintiffs' contention that *Keller* controls  
17 the decision that the Commission is not a government entity for  
18 purposes of the First Amendment, the Commission argues that  
19 *Keller's* analysis of the funding and membership of the State Bar  
20 was necessary only because the structure of the Bar was not  
21 determinative, contrary to *Lebron*:

22 Although the Court in *Keller* did not address  
23 the standard it adopted five years later in  
24 *Lebron*, that is not at all surprising given  
25 both the chronology of the cases and the fact  
26 that a super-majority of the State Bar's  
leadership was not appointed by the  
government. After *Lebron*, where a government  
official appoints the *entire board* of an  
entity, there is no need to reach the

1           analysis conducted in *Keller*.

2   The Commission maintains that *Johanns* also suggests this result,  
3   because *Johanns* distinguished the Operating Committee, only half  
4   of whose members were appointed by the government, from the Beef  
5   Board, all of whose members were appointed by the Secretary of  
6   Agriculture pursuant to law.

7           The record and state and federal statutory schemes in this  
8   action undisputedly establish that the Commission is a  
9   governmental entity under California law. Plaintiffs' motion for  
10   summary judgment on this issue is DENIED and the Commission's  
11   motion for summary adjudication is GRANTED.

12           Although this decision makes inapplicable the *Johanns* issue  
13   of effective control, *arguendo*, the issue of effective control by  
14   the State over the Commission is addressed.

15           5. Effective Control.

16           Plaintiffs contend that the provisions of the Ketchum Act  
17   and the California Department of Food and Agriculture's  
18   involvement "in the Commission's speech, let alone activities, is  
19   not even arguably in the same ball park compared to the control  
20   over the make-up and communications of the Beef Board." It  
21   follows, Plaintiffs argue, the Commission's program is not  
22   "government speech" as that term is defined in *Johanns* and they  
23   are entitled to summary adjudication on this issue.

24           Plaintiffs assert that, in contrast to the *Johanns* facts:

25           1. Pursuant to § 65551, the Commission was created as  
26   a corporate body, with the power to sue and be sued, to contract,

1 and to have all of the powers of a corporation. Plaintiffs  
2 contend that the Beef Board was not set up as a corporate body  
3 with the power to sue or be sued.

4 This distinction of corporate capacity between the  
5 Commission and the Beef Board has no bearing on the issue of  
6 "effective control" as *Johanns* discussed. *Lebron* held that where  
7 "the Government creates a corporation by special law, for the  
8 furtherance of governmental objectives, and retains for itself  
9 permanent authority to appoint a majority of the directors of  
10 that corporation, the corporation is part of the Government for  
11 purposes of the First Amendment." 513 U.S. at 400. A  
12 "'government corporation' means a corporation owned or controlled  
13 by the Government of the United States", 5 U.S.C. § 103(1), and  
14 "'executive agency' means ... a Government corporation ...." 5  
15 U.S.C. § 105. The California Pistachio Commission is subject to  
16 a virtually identical corporate provisions. See Cal. Food & Ag.  
17 Code § 69039.

18 2. Under § 65552, the Commission may appoint a  
19 manager, a treasurer and a secretary, the compensation of each  
20 officer shall be fixed by the Commission, and the officers serve  
21 at the pleasure of the Commission with such powers and duties as  
22 are delegated to them by the Commission. Plaintiffs note that  
23 there is no involvement by the California Secretary of Food and  
24 Agriculture in the appointment or compensation of Commission  
25 officers.

26 The Commission responds that "it does not appear that the

1 Secretary of Agriculture appoints, removes, or sets the salaries  
2 of the staff of the Beef Board, the Beef Board's Operating  
3 Committee, or the 'established national nonprofit industry-  
4 governed organizations' that actually implement the beef program  
5 designed by the Beef Board's Operating Committee." Members of  
6 the Beef Board and of the Operating Committee serve without  
7 compensation. 7 C.F.R. §§ 1260.148, 1260.165.

8 The California Pistachio Commission is authorized, "subject  
9 to Sections 69032 and 69033":

10 (d) To employ a manager to serve at the  
11 pleasure of the commission as president and  
12 chief executive officer of the commission,  
13 and other personnel, including legal counsel,  
14 that are necessary to carry out this chapter.  
15 The commission may retain a management firm  
16 or the staff from any board, commission, or  
17 committee of the state to perform the  
18 functions prescribed by this subdivision  
19 under the control of the commission. If the  
20 manager engages in any conduct that the  
21 secretary determines is not in the public  
22 interest or that is in violation of this  
23 chapter, the secretary shall notify the  
24 commission of the conduct and request that  
25 corrective and, if appropriate, disciplinary  
26 action be taken by the commission. If the  
commission fails or refuses to correct the  
situation or to take disciplinary action  
satisfactory to the secretary, the secretary  
may suspend or discharge the manager.

(e) To fix the compensation for all employees  
of the commission.

California Food & Agriculture Code § 69032 provides in pertinent  
part:

The secretary may require the [pistachio]  
commission to correct or cease any existing  
activity or function that is determined by  
the secretary not to be in the public

1 interest or to be in violation of this  
2 chapter.

3 If the commission refuses or fails to cease  
4 these activities or functions or to make  
5 corrections as required by the secretary, the  
6 secretary may, upon written notice, suspend  
7 all or a portion of the activities or  
8 functions of the commission until the  
9 cessation or correction of activities or  
10 functions as required by the secretary has  
11 been accomplished by the commission.

12 Actions of the commission in violation of the  
13 written notice are without legal force or  
14 effect. The secretary, to the extent  
15 feasible, shall issue written notice prior to  
16 the commission entering into any contractual  
17 relationship affecting the existing or  
18 proposed activities or functions that are the  
19 subject of the written notice.

20 Pursuant to Section 69033, "[t]he commission or the secretary may  
21 bring an action for judicial relief from the secretary's written  
22 notice, or from noncompliance by the commission with the written  
23 notice, in a court of competent jurisdiction, which may issue a  
24 temporary restraining order, permanent injunction, or other  
25 applicable relief."

26 There are no comparable provisions in the statutes  
regulating the Table Grape Commission. However, pursuant to  
Section 65650.5 "[a]ny person aggrieved by any action of the  
commission may appeal to the director." Section 65572(f)  
provides for a State audit of the Commission's books and records.

3. Under § 65570, all assessments collected by  
Commission are deposited in such banks as the Commission  
designates and are disbursed by order of the Commission.  
Plaintiffs refer to 7 U.S.C. § 2904(7), which prescribes through

1 the Beef Order require the Beef Board and its Operating Committee  
2 to:

3 (A) maintain such books and records, which  
4 shall be available to the Secretary for  
5 inspection and audit as the Secretary may  
6 prescribe;

7 (B) prepare and submit to the Secretary, from  
8 time to time, such reports as the Secretary  
9 may prescribe; and

10 (C) account for the receipt and disbursement  
11 of all funds entrusted to them.

12 The Commission argues that Plaintiffs' attempt to  
13 distinguish the control by the USDA Secretary over the Beef Board  
14 bank accounts from the purported absence of control over the  
15 Table Grape Commission bank accounts by the CDFA Secretary is  
16 unavailing. The Commission references 7 U.S.C. § 2904(9), which  
17 specifies that the Beef Order "shall provide that the Board, with  
18 the approval of the Secretary, may invest, pending disbursement,  
19 funds collected through assessments only in obligations of the  
20 United States or any agency thereof, in general obligations of  
21 any State or political subdivision thereof, in any interest-  
22 bearing account or certificate of deposit of a bank that is a  
23 member of the Federal Reserve System, or in obligations fully  
24 guaranteed as to principal and interest by the United States."  
25 The Commission argues that "[a]lthough the Beef Board is required  
26 to obtain the Secretary of Agriculture's approval, there is no  
indication that USDA controls the relevant bank accounts." The  
Commission points out that Section 2904(7) merely requires the  
Beef Board to "account for the receipt and disbursement of all

1 funds entrusted to them". Here, the Commission contends, its  
2 funds are appropriated by the Legislature.

3 Whether the Commission's funds are appropriated by the  
4 Legislature or derived from assessments is a contested fact;  
5 however, after *Johanns* this is not material. Plaintiffs focus on  
6 the absence of any prior approval or involvement by the CDFA  
7 Secretary in the investment and disbursement of Commission funds,  
8 as with the USDA Secretary's role over the Beef Board's funds.  
9 The statute governing the Pistachio Commission, Section 69043, is  
10 virtually identical to Section 65570. There is no discussion in  
11 *Paramount Land Co.*, *supra*, 491 F.3d 1003, that the statutory  
12 difference between regulation of investments by the Beef Board  
13 and those by the Pistachio Commission was of any importance.  
14 Further, Section 65572(f) requires the Commission:

15 To keep accurate books, records and accounts  
16 of all its dealings, which books, records and  
17 accounts shall be open to inspection and  
18 audit by the Department of Finance of the  
19 State of California or other state officer  
20 charged with the audit of operations of  
21 departments of the State of California.

22 4. Pursuant to § 65571, "[t]he State of California  
23 shall not be liable for the acts of the commission or its  
24 contracts" and "[p]ayment of all claims arising by reason of the  
25 administration of this chapter or acts of the commission shall be  
26 limited to the funds collected by the commission." Plaintiffs  
assert that the United States Department of Agriculture would be  
liable for claims against the Beef Board.

The Commission responds that the State generally has

1 sovereign immunity against damages claims, absent waiver of  
2 sovereign immunity. See *Country Eggs, Inc. v. Kawamura*, 129  
3 Cal.App.4th 589 (2005). Further: "Plaintiffs do not explain how  
4 the State's decision to permit suits against a single  
5 governmental entity, but to decline to waive its sovereign  
6 immunity in suits directed against the State as a whole, says  
7 anything about whether the Commission is a governmental entity.  
8 A state is free to define the scope of its own waiver of  
9 sovereign immunity."

10 Plaintiffs cite *Country Eggs, Inc. v. Kawamura, supra*, where  
11 an egg handler paid assessments mandated by the California Egg  
12 Commission, Cal. Food & Ag. Code §§ 75001 - 75176, for  
13 educational and promotional activities, which sought to avoid in  
14 a suit seeking to invalidate the statutory provisions as  
15 violative of federal constitutional rights. After a counterclaim  
16 to collect delinquent assessments was filed, Plaintiff entered  
17 into a stipulated order for dismissal and judgment against it and  
18 agreed to continue paying the assessments. Plaintiff then filed  
19 a state court action challenging the assessment scheme on state  
20 constitutional grounds. Although Plaintiff obtained a judgment  
21 for refund of its assessments, it was unable to collect the  
22 refund because the California Egg Commission had ceased  
23 operations and lacked funds to satisfy the judgment.

24 Plaintiff then sued the California Department of Agriculture  
25 for declaratory and injunctive relief, alleging that the State  
26 was liable for the debts of the Egg Commission because it allowed



1 the Egg Commission to go out of business without requiring it to  
2 set aside sufficient funds to pay the judgment, and seeking a  
3 declaration that the state immunity provision in California Food  
4 & Agriculture Code § 75070, violated the due process provisions  
5 of the United States and California Constitutions. Citing *Cal-*  
6 *Almond, Inc. v. U.S. Dept. of Agriculture*, 67 F.3d 874, 877-880  
7 (9<sup>th</sup> Cir.1995), the state Court of Appeals held in pertinent  
8 part:

9       ... Plaintiff seeks relief not from the  
10       Commission to whom it paid the assessments,  
11       but from the State. Consequently, the remedy  
12       sought is not a refund, but damages. But  
13       section 75070 specifically immunizes the  
14       State from liability for acts of the  
15       Commission and limits payment of claims to  
16       the funds collected by the Commission. As in  
17       *Cal-Almond*, plaintiff's claim cannot succeed  
18       in light of statutory immunity provisions.

19       129 Cal.App.4th at 597. The Court of Appeals then addressed  
20       Plaintiff's argument that Section 75070 does not apply because  
21       the Egg Commission was a state-created entity that provided a  
22       direct benefit to the State:

23       Under these circumstances, plaintiff  
24       suggests, the State should be held liable for  
25       the judgment the Commission owes to plaintiff  
26       under something akin to a vicarious liability  
27       or alter ego theory. Even if these theories  
28       might be appropriate in certain situations,  
29       the factual predicate for such a claim is not  
30       present here. The Commission was an  
31       independent entity and did not provide a  
32       direct benefit to the State sufficient to  
33       warrant the imposition of liability.

34       Plaintiff overreaches in asserting that  
35       because the Commission was created as an  
36       entity in state government (§ 75051),  
37       defendants are necessarily liable for the

1 Commission's financial obligations. The fact  
2 that the Commission is a creation of the  
3 State does not mean that the State is  
4 automatically responsible for the  
5 Commission's acts any more than the State is  
6 automatically responsible for a county's acts  
7 or those of any statutorily-created entity.  
8 As one court noted in determining whether a  
9 state agency could invoke the state's  
10 Eleventh Amendment immunity, '[l]abeling an  
11 entity as a "state agency" in one context  
12 does not compel treatment of that entity as a  
13 "state agency" in all contexts.' (*Lynch v.*  
14 *San Francisco Housing Authority* (1997) 55  
15 Cal.App.4th 527, 534 ....) 'It is the  
16 relationship between the entity and the  
17 state, not the label attached to the entity,  
18 that determines whether the Eleventh  
19 Amendment would shield that entity from suit  
20 in federal court.' (*Id.* at p.536.)

21 A review of the statutory scheme governing  
22 the Commission demonstrates the Commission's  
23 independence from the Department. Eight of  
24 the Commission's nine members are elected by  
25 handler members. (§ 75051.) The ninth, a  
26 public member (*see id.*), is appointed by the  
Department director from a list of nominees  
recommended by the Commission. (§ 75052.)  
Handlers also elect three alternative members  
of the Commission (§ 75058.) The Commission  
itself elects representatives to fill any  
midterm vacancies. (§ 75059.)

27 The Commission is a corporate body with the  
28 power to sue and be sued, and to enter into  
29 contracts. (§§ 75064, 75092.) The  
30 Commission controls its own finances. Any  
31 funds the Commission receives, including  
32 assessments paid by handlers, are to be  
33 deposited into a bank account designated by  
34 the Commission, and those funds 'shall be  
35 disbursed by order of the Commission through  
36 the agent or agents that it designated for  
37 that purpose.' (§ 75069.) The Commission  
38 can incur expenses, create liabilities and  
39 borrow funds in advance of receipt of  
40 assessments. (§ 75088.) It can accept  
41 contributions for the purpose of carrying out  
42 its activities. (§ 75092.5.)

1 The Commission is empowered to adopt its  
2 rules and regulations (§ 75082), and  
3 administer and enforce its activities. (§  
4 75083.)

5 The Department plays a narrowly circumscribed  
6 role in the Commission's activities. The  
7 Department director sits on the Commission,  
8 but only as an ex officio member. (§ 75053.)  
9 His or her authority over the Commission's  
10 activities is limited to the ability to  
11 'require the [C]ommission to correct or cease  
12 any existing activity or function which is in  
13 violation of this chapter.' (§ 75054, subd.  
14 (a).) If the Commission does not comply with  
15 such a directive, the director may suspend  
16 all or a portion of the Commission's  
17 activities. (§ 75054, subd. (b).)

18 In short, the Commission enjoys broad  
19 authority, independent of the Department.  
20 Given this independence, there is no basis to  
21 make the State liable for the Commission's  
22 activities. (Cf. *ITSI TV Productions v.*  
23 *Agricultural Associations* (9<sup>th</sup> Cir. 1993) 3  
24 F.3d 1289, 1292 [outlining factors for  
25 determining whether a state agency is an arm  
26 of the state for purposes of Eleventh Amend.  
immunity].)

1 Plaintiff argues that liability is proper  
2 because the State directly benefits from the  
3 Commission's activities and, as evidence of  
4 the State's interest, it points to several  
5 statements included in the statutes creating  
6 the Commission. For example, section 75001  
7 recognizes that the 'maintenance and  
8 expansion of the market for eggs is vital to  
9 the economy of California.' Section 75003  
10 declares it to be state policy 'to aid in the  
11 handling of eggs and egg products, to develop  
12 more efficient and equitable methods in  
13 handling, and to maintain job security for  
14 workers in the egg industry.' Similarly,  
15 section 75004 provides: 'The production of  
16 eggs and egg products in this state and the  
17 marketing of eggs and egg products in this  
18 state, regardless of their point of origin is  
19 hereby declared to be affected with a public  
20 interest. This chapter is enacted in the  
21 exercise of the police power of this state

1           for the purpose of protecting the health,  
2           peace, safety, and general welfare of the  
3           people of this state.'

4           These general statements do not link  
5           defendants to the Commission's activities to  
6           such an extent that vicarious liability is  
7           constitutionally compelled. The benefits  
8           flowing to the State from the Commission's  
9           operations are indirect, and do not provide  
10          support for declaring section 75070  
11          unconstitutional as applied to this case.

12       129 Cal.App.4th at 597-599.

13           Section 69044 governing the Pistachio Commission is  
14          virtually identical to Section 65571. There is no discussion in  
15          *Paramount Land Co., supra*, 491 F.3d 1003, that making the  
16          Pistachio Commission, as opposed to the State of California,  
17          liable for claims against the Pistachio Commission was a relevant  
18          factor in determining whether or not *Johanns* applied.

19           5. Pursuant to § 65600, an assessment upon all fresh  
20          grapes shipped during each marketing season "as fixed by the  
21          commission" shall be levied, but, during any marketing season,  
22          the assessment shall not exceed the amount specified in § 65600.

23           Section 69081 governing the Pistachio Commission is  
24          virtually identical to Section 65600.

25           6. Pursuant to § 65650, the Commission may bring an  
26          action in its name to redress violations "of this chapter or any  
27          rule or regulation." Plaintiffs contend that the California  
28          Department of Food and Agriculture may not do so.

29           The Pistachio Commission also is accorded the right "to  
30          commence civil actions and utilize all remedies provided in law

1 or equity for the collection of assessments and civil penalties,  
2 and for the obtaining of injunctive relief or specific  
3 performance, respecting this chapter and the rules and  
4 regulations adopted under this chapter."

5 7. Pursuant to § 65650.5, any person aggrieved by any  
6 action of the Commission may appeal to the Secretary of Food and  
7 Agriculture, who shall review the record of the proceedings  
8 before the Commission and either dismiss the appeal or reverse  
9 the action of the Commission. "Any such decision of the director  
10 [sic] is subject to judicial review upon petition of the  
11 commission or any party aggrieved by the decision."<sup>4</sup>

12 Plaintiffs emphasize that this provision allows the  
13 Commission to sue the Secretary.

14 The statutory provisions governing the Pistachio Commission  
15 include Section 69062:

16 The commission shall adopt procedures for the  
17 purpose of according individuals aggrieved by  
18 its actions or determinations an informal  
19 hearing before the commission or before a  
20 committee of the commission designated for  
21 that purpose. Appeals from decisions of the  
22 commission may be made to the secretary. The  
23 determination of the secretary shall be  
24 subject to judicial review upon petition  
25 filed with the appropriate court.

26 The Pistachio Commission theoretically can sue the Secretary as,  
theoretically, can the Table Grape Commission. Nothing in

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<sup>4</sup>The Secretary of Food and Agriculture was formerly known as the "director". Cal.Food & Ag.Code § 50 provides that the term "director" means the Secretary of Food and Agriculture. See Cal.Jur.3rd, Agriculture, § 4.

1 *Paramount* indicates that this possibility is of any relevance to  
2 "effective control" within the meaning of *Johanns*. Moreover, no  
3 waiver of sovereign immunity can be found, except if the  
4 legislature has clearly and unequivocally so provided.

5 8. Plaintiffs assert that there is no provision in the  
6 Ketchum Act for the Secretary to oversee, review, or  
7 approve/disapprove any of the Commission's activities.

8 This is the biggest area of difference from the statutes  
9 governing the Pistachio Commission. Section 69051, which  
10 describes the powers and duties of the Pistachio Commission,  
11 provides that annual books and records be subject to an annual  
12 audit by an auditing firm selected by the Pistachio Commission  
13 "with the concurrence of the secretary", that the audit be made  
14 part of an annual report to all producers, "copies of which shall  
15 also be submitted to the Legislature and the department", and  
16 that, as the secretary deems necessary, the secretary may  
17 "conduct or cause to be conducted a fiscal and compliance audit  
18 of the commission", § 69051(h); that the annual budget "shall be  
19 concurred in by the secretary prior to disbursement of funds",  
20 except for disbursements made to pay employees of the Pistachio  
21 Commission, § 69051(p); and "[t]o submit to the secretary, for  
22 his or her concurrence, an annual statement of contemplated  
23 activities authorized under this chapter, including advertising,  
24 promotion, marketing research, and production research," §  
25 69051(g). In addition, Section 69041 provides that "[t]he  
26 secretary or the secretary's representatives shall be notified

1 and may attend each meeting of the commission, and any committee  
2 meeting of the commission." Sections 69032 and 69033 grant the  
3 Secretary authority to correct Pistachio Commission acts deemed  
4 by the Secretary not to be in the public interest or in violation  
5 of the chapter and to enforce that determination by legal action.

6 There is nothing in the statutes governing the Table Grape  
7 Commission mirroring this type of oversight. However, Section  
8 65650.5 provides for appeal to and review by the Secretary of any  
9 action by the Commission and subsequent judicial review, and  
10 Section 65572(f) provides for a State audit of the Commission's  
11 books and records. The Stipulated Undisputed Facts establish  
12 that the CDFA reviews any complaint to it about a Commission  
13 advertisement and can request that the Commission provide the  
14 CDFA with notices of meetings, minutes, contracts and copies of  
15 advertisements.

16 9. Plaintiffs focus on the following distinction in  
17 Table Grape Commission authority:

18 a. No one from the Department of Food and  
19 Agriculture is notified of Commission meetings, attends  
20 Commission meetings, or receives and/or approves minutes of  
21 Commission meetings;

22 b. No one from the Department of Food and  
23 Agriculture is notified of or approves the Commission's  
24 assessment rate, the Commission's budget, staff salaries,  
25 contracts, research projects, export marketing and promotions;

26 c. The Department of Food and Agriculture does

1 not review or approve Commission advertising, promotion, research  
2 of marketing plans, advertising copy, does not audit the  
3 Commission and does not approve the Commission's expenditures.

4 d. Pursuant to § 65550, members of the Commission  
5 are appointed by the Secretary from nominees selected as provided  
6 by elections set forth in § 65556 and one public member is  
7 appointed pursuant to § 65575.1. Plaintiffs, however, reference  
8 evidence that the Secretary has always appointed as Commission  
9 members those who received the most votes from the producers who  
10 voted.

11 Plaintiffs' contention does not undermine the fact that  
12 members of the Commission are appointed by the Secretary and that  
13 the Secretary has the authority to select those members.

14 e. Neither the Department of Food and Agriculture  
15 or any other state agency is involved in or reviews Commission  
16 decisions on expenditures and programs.

17 Plaintiffs' contention is incorrect. Section 65572(f)  
18 provides for a State audit of the Commission's books and records.

19 f. Plaintiffs next cite their request to the  
20 Department of Food and Agriculture to provide all documents in  
21 its possession from January 1, 2000 to December 13, 2005  
22 "relating to CDFA approval, disapproval, comment, criticism or  
23 any other discussion or mention of the California Table Grape  
24 Commission's advertisements, promotions, marketing, public  
25 relations, press releases, lobbying activities, governmental  
26 relation activities or proposed drafts of all of the same, and



1 any and all documents in CDFA's possession relating to CDFA's  
2 approval, disapproval, comment, criticism or any other discussion  
3 or mention of the Commission's budget, expense reports, travel  
4 authorization or any other Commission expenditures."

5 The Department of Food and Agriculture responded "by stating  
6 that it possessed a document relating to possible legislative  
7 action, which CDFA considered exempt from the request, and the  
8 department possessed bills submitted to the Commission for  
9 payment of services rendered by the Marketing Branch to the  
10 Commission." No other documents responsive to the request were  
11 produced.

12 Relying on these alleged distinctions, Plaintiffs argue that  
13 "[f]or the Commission to claim that CDFA provides 'effective  
14 control' over the Commission's activities is to distort *Johanns*  
15 beyond recognition, and to trivialize the legislature's obvious  
16 intent to provide the Commission with virtual unlimited autonomy  
17 not subject to CDFA control or review."

18 The Commission responds that, although *Johanns* discussed the  
19 extensive oversight by the USDA of the beef program, nothing in  
20 the decision requires such a level of involvement for an  
21 agricultural entity's published messages to be "government  
22 speech." Because the Ketchum Act provides that the Secretary of  
23 the CDFA appoints and can remove all members of the Commission,  
24 because the CDFA can reverse an action of the Commission that it  
25 determines to be contrary to law or an abuse of discretion, and  
26 because the State audits the Commission's books and records, the

1 CDFA retains "effective control" over the Commission and, under  
2 *Johanns*, nothing more is required. The Commission argues that  
3 *Johanns* "as well as the Court's other case law and general  
4 constitutional principles ... indicate that where the government  
5 has 'set out the overarching message,' and has established a  
6 regulatory framework that makes the speaking entity 'answerable'  
7 to a politically accountable official, the resulting speech is  
8 government speech regardless of whether the government  
9 micromanages the dissemination of the message."

10 The Commission suggests the *Johanns* decision rejected the  
11 argument that the beef program did not qualify as government  
12 speech because it is funded by assessments rather than the  
13 general revenue. The Supreme Court distinguished those cases,  
14 pointing out that government speech is subject to democratic  
15 accountability: "[T]he beef advertisements are subject to  
16 political safeguards more than adequate to set them apart from  
17 private messages", 544 U.S. at 563. The Commission asserts that  
18 the reference to "more than adequate" safeguards "made clear its  
19 decision should not be understood to establish a blueprint that  
20 Congress or a state legislature must follow in every case to  
21 convey a 'government message.'"

22 Citing *Southworth, supra*, 529 U.S. at 235, that "[w]hen the  
23 government speaks, for instance to promote its own policies or to  
24 advance a particular idea, it is, in the end, accountable to the  
25 electorate and the political processes for its advocacy", the  
26 Commission argues that this rationale also applies where the

1 government uses a private entity to disseminate its message:

2 If the government has the power to stop the  
3 private entity from promulgating a particular  
4 message or to cause the private entity to  
5 change its message, the government will  
6 ultimately be held accountable for that  
7 message if the voters disapprove. If, for  
8 example, the Commission were to run profane  
9 or indecent advertising, the Secretary of the  
10 CDFA and the Governor would be hardpressed to  
11 explain to Californians why they did not stop  
12 it ... Plaintiffs themselves acknowledge the  
13 political accountability in the California  
14 government for the Commission's activities  
15 when they note that the level of CDFA  
16 oversight depends more on the Administration  
17 in power in Sacramento than any other factor.

18 The Commission also cites *Rust v. Sullivan*, 500 U.S. 173 (1991),  
19 and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) as  
20 Supreme Court precedent indicating that the government need not  
21 micromanage the dissemination of messages it has crafted.  
22 However, these cases do not involve the issue of "government  
23 speech" and do not constitute authority for the Commission's  
24 position.

25 Finally, the Commission argues that requiring prior review  
26 and approval of the precise wording of all government speech  
would lead to "absurd results":

27 Business-improvement districts funded by  
28 mandatory contributions, for example, would  
29 have to get express government approval for  
30 the precise wording of promotional flyers  
31 they post in the downtown business district.  
32 If the government were to hire a private  
33 consultant to develop and run an ad campaign  
34 within certain defined parameters, the  
35 advertisements would fail to constitute  
36 government speech simply because a government  
official did not review and approve the  
precise wording of the ads. Indeed, an

1 advertisement prepared by a low-level  
 2 government official without any consultation  
 3 with his supervisor would constitute  
 4 government speech, while the same  
 5 advertisement prepared by a consultant  
 6 executing instructions from a cabinet  
 7 secretary would be private speech if the  
 8 secretary chose not to look at the final  
 9 wording of the ads. It is untenable to  
 10 conclude that the First Amendment prescribes  
 11 a precise and narrowly defined set of  
 12 bureaucratic procedures whenever the  
 government uses private speakers to transmit  
 government messages. Imposing such a  
 requirement of micromanagement is surely not  
 what the Supreme Court had in mind when it  
 placed such emphasis in [*Johanns*] on the fact  
 that the private entity disseminating the  
 government's message must be 'answerable' to  
 a politically accountable official and when  
 it noted that the Beef Board's overall set of  
 safeguards was 'more than adequate.'

13 Plaintiffs respond that the Commission's argument that  
 14 *Johanns* does not require the same degree of micromanagement  
 15 before a finding of government speech may be found is "grasping  
 16 at straws":

17 [A]pparently *Johanns* did not think it would  
 18 lead to absurd results because that's what it  
 19 required when funding comes from a targeted  
 20 designated class (as opposed to general  
 21 taxpayer revenue) with respect to the Beef  
 22 Board. It required mandatory micro-managing  
 23 of the precise wording for the government to  
 24 be able to hang its hat on 'government  
 25 speech'. It would obviously be different if  
 26 the State simply dinged all tax paying  
 citizens to fund whatever message the elected  
 official of government wanted to carry out,  
 being responsible for that message when they  
 come up for reelection. Neither the  
 producers nor the citizens get to vote for  
 the Secretary of Agriculture, nor the Branch  
 Chief of the Secretary of Agriculture;  
 general taxpayer funds are not being used but  
 instead the targeted hit is on table grape  
 producers. Obviously, in that situation the

1 U.S. Supreme Court in *Johanns* required such  
2 micro-management by a defined government  
3 agency, USDA, and the Secretary of USDA. It  
4 is simply remarkably disingenuous for the  
5 Commission to argue that the U.S. Supreme  
6 Court in-depth recitation of the Secretary's  
7 control over the Beef Board and the message  
8 was simply pontificating *dicta*.

9 *Johanns* addressed the degree of effective control without  
10 defining conditions that constitute the required degree of  
11 control before "government speech" in a compelled subsidy case is  
12 established. In *Johanns*, the Supreme Court described the facts  
13 before it, from which it found that control "more than adequate."  
14 The inquiry does focus on the extent of the CDFA's control over  
15 the Commission. Plaintiffs seek a rule that unless every  
16 procedure/requirement present in *Johanns* is here present, there  
17 is no "government speech." In *Paramount Land Co., supra*, 491  
18 F.3d at 1012, the Ninth Circuit cautioned:

19 We acknowledge that there are differences in  
20 actual oversight between the beef scheme and  
21 the pistachio scheme, but these factual  
22 differences are legally insufficient to  
23 justify the injunction. To draw a line  
24 between these two approaches to oversight  
25 risks micro-managing legislative and  
26 regulatory schemes, a task federal courts are  
27 ill-equipped to undertake. 'The message set  
28 out in the [pistachio] promotions is from  
29 beginning to end the message established' by  
30 the state government.

31 The statutory provisions governing the Commission, coupled with  
32 the Stipulated Undisputed Facts, demonstrate as a matter of law  
33 the CDFA has the effective control over the Commission required  
34 by *Johanns*.

35 Plaintiffs' motion for partial summary judgment on the issue

1 of effective control within the meaning of *Johanns* is DENIED; the  
2 Commission's motion for summary judgment on this issue is  
3 GRANTED.

4  
5  
6 G. APPLICABILITY OF CENTRAL HUDSON TEST.

7 Assuming *arguendo* that *Johanns* does not apply, the  
8 Commission's motion for summary judgment on the application of  
9 the *Central Hudson* test is addressed.

10 The Commission moves for summary judgment that the Ketchum  
11 Act is constitutional under the test described in *Central Hudson*  
12 *Gas & Electric Corp. v. Public Service Commission of New York*,  
13 447 U.S. 557 (1980), which the Commission characterizes as  
14 "intermediate scrutiny". Plaintiffs move for summary  
15 adjudication that the *Central Hudson* test is not applicable in  
16 determining the constitutionality of the Ketchum Act under the  
17 First Amendment.

18 In *Central Hudson*, the Supreme Court discussed First  
19 Amendment restrictions on commercial speech, i.e., "expression  
20 related solely to the economic interests of the speaker and its  
21 audience." 447 U.S. at 561. Under *Central Hudson*, restrictions  
22 on lawful, non-misleading commercial speech are evaluated under a  
23 three-part test. First, the asserted government interest behind  
24 the restrictions must be substantial. Second, the restrictions  
25 must directly advance that interest. Third, the program must not  
26 be more extensive than necessary to serve that interest. *Id.*, at

1 566.

2 The Ninth Circuit's *Wileman Bros. & Elliott, Inc. v. Espy*,  
3 58 F.3d 1367 (9<sup>th</sup> Cir.1995), opinion analyzed the First Amendment  
4 challenge to the generic advertising program assessments  
5 promulgated the federal Marketing Order under the AMAA for  
6 nectarines, peaches and plums under the *Central Hudson* test and  
7 concluded that the program violated the First Amendment. In  
8 reversing the Ninth Circuit, the Supreme Court held in *Glickman*  
9 *v. Wileman Brothers & Elliott, supra*, 521 U.S. 457, that it was  
10 error for the Ninth Circuit to rely on *Central Hudson* for the  
11 purpose of testing the constitutionality of marketing order  
12 assessments for promotional advertising:

13 The Court of Appeals fails to explain why the  
14 *Central Hudson* test, which involved a  
15 restriction on commercial speech, should  
16 govern a case involving the compelled funding  
17 of speech. Given the fact that the Court of  
18 Appeals relied on *Abod* for the proposition  
19 that the program implicates the First  
20 Amendment, it is difficult to understand why  
21 the Court of Appeals did not apply *Abod*'s  
22 'germaneness' test.'

23 *Id.*, at 474 n.18. The Supreme Court held that application of the  
24 *Central Hudson* test "is inconsistent with the very nature and  
25 purpose of the collective action program at issue here":

26 The Court of Appeals concluded that the  
advertising program does not 'directly  
advance' the purposes of the marketing orders  
because the Secretary had failed to prove  
that generic advertising is any more  
effective in stimulating consumer demand for  
the commodities than the advertising that  
might otherwise be undertaken by producers  
acting independently. We find this an odd  
burden of proof to assign to the

1 administration of marketing orders that  
2 reflect a policy of displacing unrestrained  
3 competition with Government supervised  
4 cooperative marketing programs. If there  
5 were no marketing orders at all to set  
6 maturity levels, size, quantity, and other  
7 features, competition might well generate  
8 greater production of nectarines, peaches,  
9 and plums. It may also be true that if there  
10 were no generic advertising, competition  
11 would generate even more advertising and an  
12 even larger consumer demand than does the  
13 cooperative program. But the potential  
14 benefits of individual advertising do not  
15 bear on the question whether generic  
16 advertising directly advances the statute's  
17 collectivist goals. Independent advertising  
18 would be primarily motivated by the  
19 individual competitor's interest in  
20 maximizing its own sales, rather than in  
21 increasing the overall consumption of a  
22 particular commodity. While the First  
23 Amendment unquestionably protects the  
24 individual producer's right to advertise its  
25 own brands, the statute is designed to  
26 further the economic interests of the  
producers as a group. The basic policy  
decision that underlies the entire statute  
rests on an assumption that in the volatile  
markets for agricultural commodities the  
public will be best served by compelling  
cooperation among producers in making  
economic decisions that would be made  
independently in a free market. It is  
illogical, therefore, to criticize any  
cooperative program authorized by this  
statute on the ground that competition would  
provide greater benefits than joint action.

*Id.* at 475.

21 The Commission argues that the Supreme Court in *Glickman*  
22 only reversed the Ninth Circuit because it concluded, under the  
23 circumstances of that case, that the *Central Hudson* analysis was  
24 too demanding because the generic advertising program did not  
25 implicate the First Amendment and, to the extent that it did, it  
26



1 was constitutional under the *Abood* germaneness test. In a case  
2 where the First Amendment is implicated, the Commission argues,  
3 there is no reason to think that the Ninth Circuit will deviate  
4 from its original conclusion in *Wileman Bros.* that a program is  
5 constitutional if it passes intermediate scrutiny under *Central*  
6 *Hudson*. The Commission opines that the Supreme Court's *United*  
7 *Foods* decision, *supra*, 533 U.S. 405, is not to the contrary  
8 because the *Central Hudson* test was not argued by the United  
9 States and was not before the Court. The Commission points to  
10 the California Supreme Court's application of the *Central Hudson*  
11 test to a First Amendment challenge under the California  
12 Constitution to the California Plum Marketing Program issued by  
13 the Secretary of Food and Agriculture pursuant to the California  
14 Marketing Act of 1937. See *Gerawan Farming, Inc. v. Kawamura*, 33  
15 Cal.4th 1 (2004):

16 4. The Proper State Constitutional Test

17 As noted, the court in *Glickman* held that if  
18 the First Amendment had been implicated, then  
19 the 'test' of *Abood* and *Keller* would 'clearly  
20 [be] satisfied in this case because ... the  
21 generic advertising ... is unquestionably  
22 germane to the purposes of the marketing  
23 order[] ... (*Glickman, supra*, 521 U.S. at p.  
24 473). As has been recognized, the standard  
25 employed by the *Glickman* court was 'plainly  
26 less exacting' than the intermediate scrutiny  
test employed in testing the  
constitutionality of commercial speech  
restrictions. (*Gerawan I, supra*, 24 Cal.4th  
at pp. 534-535 (dis. opn. of George C., J.)  
In light of our recognition in *Gerawan I* that  
the generic advertising program does in fact  
implicate the free speech clause, that is to  
say, a program of compelled subsidization of  
generic advertising does interfere with the

1 right protected under the free speech clause  
2 and requires some justification for that  
3 interference, we believe it would be  
4 incongruous to subject the program to only  
5 minimal scrutiny.

6 On this point, we are partly persuaded by  
7 Justice Souter's dissent in *Glickman, supra*,  
8 521 U.S. at page 477, wherein he points out  
9 that previous forays into compelled funding  
10 of speech have involved areas in which the  
11 importance of the government interest at  
12 stake and legitimacy of compelled association  
13 was already well established. Commenting on  
14 the seminal case of *Abood, supra*, 431 U.S.  
15 209, Justice Souter reasoned that the court  
16 had concluded some interference with the  
17 First Amendment interests was  
18 "'constitutionally justified by the  
19 legislative assessment of the important  
20 contribution of the union shop to the system  
21 of labor relations established by Congress."  
22 [Citation]; see also *Keller, supra*, [496 U.S.  
23 at pp.] 13-14 ("[T]he State's interest in  
24 regulating the legal profession and improving  
25 the quality of legal services" justifies "the  
26 compelled association [inherent in the]  
integrated bar"). But this was simply a way  
of saying that the government's objective of  
guaranteeing the opportunity for a union  
shop, the importance and legitimacy of which  
were already settled, [citations], could not  
be attained without the incidental  
infringements of the interests in unfettered  
speech and association that petitioners there  
claimed.' (*Glickman, supra*, 521 U.S. at p.  
484 (dis. opn. of Souter, J.).)

Justice Souter appears correct that an  
assumption underlying *Abood* and *Keller*,  
albeit an implicit one, is that the interest  
justifying the compelled association must be  
important, and that there be no effective  
alternative means of achieving this interest  
with less intrusion on free speech rights.  
On the other hand, the conclusion of the  
*Glickman* majority that the compelled funding  
of generic advertising requires only minimal  
scrutiny is at variance with the general rule  
that intrusion into free speech rights  
requires substantial justification, even when

1 the intrusion is incidental to the  
2 enforcement of a content-neutral law. (See  
3 *O'Brien v. United States* (1968) 391 U.S. 367  
4 ... The requirement of substantial  
5 justification is further supported by the  
6 fact that the right of free speech under the  
7 California Constitution is in some respects  
8 "broader" and "greater" than under the  
9 First Amendment. (*Gerawan I, supra*, 24  
10 Cal.4th at p.491, and cases cited therein.)

11 Because generic advertising was not self-  
12 evidently incidental to the functioning of  
13 some important, legislatively established  
14 institution, such as a union shop or an  
15 integrated state bar as in *Abood* and *Keller*,  
16 Justice Souter argued for treating compelled  
17 funding of such advertising the same as any  
18 other regulation implicating the right of  
19 commercial speech, subjecting it to the test  
20 articulated in *Central Hudson* ... We believe  
21 this intermediate standard appropriately  
22 protects the free speech rights article I was  
23 designed to safeguard. Drawing on  
24 constitutional doctrine summarized above, we  
25 conclude that the compelled funding of  
26 commercial speech neither warrants  
application of the strictest scrutiny  
reserved for such matters as the censorship  
or compelled utterance of noncommercial  
speech (see, e.g., *Texas v. Johnson* (1989)  
491 U.S. 397, 412 ...; *West Virginia Bd. of*  
*Ed. v. Barnett* (1943) 319 U.S. 624, 642 ...,  
nor can it pass muster simply because it is  
rationally based.

33 Cal.4th at 20-22.

20 Plaintiffs argue that the Commission is "clearly wrong"  
21 because the Supreme Court has never applied the *Central Hudson*  
22 test for commercial speech restrictions in a case involving  
23 compelled subsidies. While the Ninth Circuit utilized the  
24 *Central Hudson* test in *Wileman Bros.*, Plaintiffs note that it did  
25 so before *United Foods* was decided by the Supreme Court. Since  
26 *United Foods*, Plaintiffs contend, the Ninth Circuit followed

1 *United Foods in Delano Farms Co. v. California Table Grape*  
2 *Com'n., supra*, 318 F.3d 895. Plaintiffs assert that the Supreme  
3 Court "applied the directly relevant line of authority, namely,  
4 *Abood/Keller/United Foods* line of cases addressing compelled  
5 subsidies of speech." Plaintiffs further assert that cases since  
6 *United Foods* have refused to apply the *Central Hudson* test.

7 Plaintiffs cite *In re Washington State Apple Advertising*  
8 *Commission*, 257 F.Supp.2d 1290 (E.D.Wash.2003), where the  
9 District Court rejected the argument that the *Central Hudson* test  
10 applied:

11 While advertising fits the classical  
12 definition of commercial speech in that it  
13 does no more than propose a commercial  
14 transaction, *Central Hudson*, 447 U.S. at 562  
15 ..., the Commission's mandatory assessments  
16 are not a restriction upon the commercial  
17 speech of the Defendants like a restriction  
18 on their ability to advertise would be.  
19 Rather, the objecting apple producers are  
20 compelled to pay for commercial speech.  
21 Although *United Foods* did not clearly reject  
22 application of the *Central Hudson* test, it  
23 did refuse to consider the first prong of  
24 that test:

25 We need not enter into that  
26 controversy, for even viewing  
commercial speech as entitled to  
lesser protection, we find no basis  
under either *Glickman* or our other  
precedents to sustain the compelled  
assessments sought in this case ...  
the Government itself does not rely  
upon *Central Hudson* to challenge  
the Court of Appeals' decision ...,  
and we therefore do not consider  
whether the Government's interest  
could be considered substantial for  
purposes of the *Central Hudson*  
test.

1        *United Foods*, 121 S.Ct. at 2337-38. The  
2        Court concludes that *United Foods*, by  
3        refraining from deciding the first prong of  
4        *Central Hudson*, deemed the commercial speech  
5        test inapplicable. *Central Hudson*'s test,  
6        which requires that the restriction on speech  
7        not be 'more extensive than necessary' to  
8        serve the interest, 447 U.S. at 566 ...,  
9        presupposes a restriction on speech. Here,  
10       the Defendants' speech is not being  
11       restricted, instead it is being compelled.  
12       Because the Commission's assessments do not  
13       restrict speech, it is inappropriate to apply  
14       the *Central Hudson* test for restrictions on  
15       speech. See also *Glickman*, 521 U.S. at 474  
16       n.18 ... (reversing the Ninth Circuit's  
17       decision to apply *Central Hudson*).

18       At argument on these motions, the Commission  
19       argued that *United Foods* cited a compelled  
20       speech case, *Zauderer v. Office of*  
21       *Disciplinary Counsel*, 471 U.S. 626 ...  
22       (1985), which applied the *Central Hudson*  
23       test, undermining this Court's conclusion not  
24       to apply *Central Hudson* at all. *Zauderer*  
25       upheld the requirement that an attorney, who  
26       chose to advertise, include certain  
disclosures in that advertising. *Id.* at 650-  
52. *Zauderer* reasoned that because the  
government is free to regulate commercial  
speech to prevent it from being false,  
deceptive or misleading, *id.* at 638 ..., it  
can compel speech to ensure those ends as  
well, *id.* at 652 ... Because the rationale  
for regulation there, to prevent false and  
misleading commercial speech, does not apply  
to the compelled funding of commercial speech  
here, *Zauderer* is inapplicable to this case.  
See also *United Foods*, 533 U.S. at 416 ...  
(holding that *Zauderer* was inapposite because  
there was no suggestion that the mandatory  
assessments were necessary to prevent  
voluntary advertising from being misleading).

257 F.Supp.2d at 1303-1304.

Plaintiffs cite *Michigan Pork Producer's Association, Inc.*  
*v. Veneman*, 348 F.3d 157, 163 (6<sup>th</sup> Cir.2003), reversed and  
remanded for further consideration in light of *Johanns v.*

1 *Livestock Marketing Association*, 544 U.S. 1058 (2005), remanded  
2 to District Court:

3 [W]e find inapplicable to this case the  
4 relaxed scrutiny of commercial speech  
5 analysis provided for by *Central Hudson* and  
6 relied upon by Appellants. The Pork Act does  
7 not directly limit the ability of pork  
8 producers to express a message; it compels  
9 them to express a message with which they do  
10 not agree. Even assuming that the  
11 advertising funded by the Act is indeed  
12 commercial speech, the more lenient standard  
13 of review applied to limits on commercial  
speech has never been applied to speech -  
commercial or otherwise - that is compelled.  
See *Glickman*, 521 U.S. at 474 n.18  
(questioning whether 'the *Central Hudson*  
test, which involved restrictions on  
commercial speech, should govern a case  
involving the compelled funding of speech').  
It is one thing to force someone to close her  
mouth; it is quite another to force her to  
become a mouthpiece.

14 In *Cochran v. Veneman*, 359 F.3d 263, 276-280 (3<sup>rd</sup> Cir.2004),  
15 judgment reversed and remanded for further consideration in light  
16 of *Johanns v. Livestock Marketing Association*, 544 U.S. 1058  
17 (2005), also cited by Plaintiffs, the Third Circuit, after  
18 discussion of *Central Hudson* and *Abood*, applied the germaneness  
19 test of *Abood* rather than the *Central Hudson* test. In *Pelts &*  
20 *Skins, LLC v. Landreneau*, 365 F.3d 423, 434 n.21 (5<sup>th</sup> Cir.2004),  
21 judgment reversed and remanded for further consideration in light  
22 of *Johanns v. Livestock Marketing Association*, 544 U.S. 1058  
23 (2005), remanded to District Court, 448 F.3d 743 (5<sup>th</sup> Cir.2006),  
24 the Fifth Circuit doubted that the *Central Hudson* test applied  
25 but choose to leave the question open because even if the *Central*  
26 *Hudson* test were applied, Louisiana's alligator marketing program

1 would not pass it.

2       These Circuit Court opinions are no longer valid authority;  
3 all were reversed and remanded by the Supreme Court based on  
4 *Johanns*. Following the Supreme Court's reversal and remand, the  
5 Third Circuit in *Cochran v. Veneman* entered an Order affirming  
6 the judgment of the District Court for the Middle District of  
7 Pennsylvania, 252 F.Supp.2d 126 (M.D.Pa.2003), which the Third  
8 Circuit had previously reversed; upon remand by the Fifth Circuit  
9 to the District Court in *Pelts & Skins*, the District Court  
10 granted a Consent Motion to Dismiss All Claims Without Prejudice  
11 and did not affirmatively consider the impact of *Johanns* on the  
12 case; upon remand by the Sixth Circuit in *Michigan Pork*  
13 *Producers*, the District Court entered a Stipulation for Dismissal  
14 and did not affirmatively consider the impact of *Johanns* on the  
15 case.<sup>5</sup>

16       The Commission's assertion that *Glickman* rejected the  
17 *Central Hudson* test as "too demanding" finds no support in  
18 *Glickman's* majority opinion. It appears that the Commission  
19 bases this interpretation on the California Supreme Court's  
20 reliance in *Gerawan, id.*, 33 Cal.4th at 20-22, on Justice  
21 Souter's dissenting opinion. The majority opinion in *Glickman*  
22 clearly questioned the application of *Central Hudson* to First  
23

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24       <sup>5</sup>The Court may take judicial notice of matters of public  
25 record, including duly recorded documents, and court records  
26 available to the public through the PACER system via the internet.  
See Fed. R. Evid. Rule 201(b); *United States v. Howard*, 381 F.3d  
873, 876, fn.1 (9th Cir. 2004).



1 Amendment challenges in compelled subsidy cases and held that the  
2 Ninth Circuit erred in relying on *Central Hudson*. That the  
3 California Supreme Court reached a different conclusion relying  
4 on a dissenting opinion does not change the law and is not  
5 binding on a federal district court addressing the First  
6 Amendment to the United States Constitution. The Commission's  
7 assertion that the Ninth Circuit will continue to apply *Central*  
8 *Hudson* is speculation unsupported by any case authority since  
9 *Glickman*, other than the California Supreme Court's *Gerawan*  
10 decision.

11 The Commission contends that *Central Hudson* intermediate  
12 scrutiny is appropriate because the Ketchum Act only requires  
13 funding of commercial speech and the Ketchum Act satisfies the  
14 *Central Hudson* test. The cases discussed above support the view  
15 that *Central Hudson* simply does not apply.

16 Plaintiffs' motion for summary judgment that the *Central*  
17 *Hudson* test is not applicable in determining the  
18 constitutionality of the Ketchum Act as it relates to the Table  
19 Grape Commission is GRANTED and the Commission's motion that the  
20 Ketchum Act is constitutional under the *Central Hudson* test is  
21 DENIED. The *Central Hudson* test does not apply.

22 H. WHETHER GLICKMAN OR UNITED FOODS APPLIES.

23 If *Johanns* does not apply, Plaintiffs move for summary  
24 adjudication that the Supreme Court's ruling in *United States v.*  
25 *United Foods, Inc.*, *supra*, 533 U.S. 405, rather than the ruling  
26 in *Glickman v. Wileman Brothers & Elliott*, *supra*, 521 U.S. 457,



1 governs the Ketchum Act. Plaintiffs contend that the Ninth  
2 Circuit's *Delano Farms v. California Table Grape Commission*,  
3 *supra*, 318 F.3d 895 (9<sup>th</sup> Cir.2003), ruling is "law of the case"  
4 and that the undisputed facts in this action demonstrate that  
5 *United Foods* controls.

6 1. *Glickman v. Wileman Brothers & Elliott*.

7 In *Glickman v. Wileman Brothers & Elliott, supra*, 521 U.S.  
8 457 (1997), California tree-fruit growers, handlers and  
9 processors initiated administrative proceedings challenging the  
10 validity of various regulations contained in marketing orders  
11 promulgated by the United States Secretary of Agriculture under  
12 the Agricultural Marketing Act of 1937 (AMAA). The disputed  
13 orders assessed respondents for, *inter alia*, the cost of generic  
14 advertising of California nectarines, plums and peaches. After  
15 the Department of Agriculture upheld the generic advertising  
16 regulations, respondents sought judicial review. The district  
17 court found the orders lawful. The Ninth Circuit, relying on  
18 *Central Hudson, supra*, 447 U.S. 557, held that the Government  
19 enforced contributions to pay for generic advertising violated  
20 respondents' commercial speech rights. See *Wileman Bros. &*  
21 *Elliott, Inc. v. Espy, supra*, 58 F.3d 1367. The question  
22 presented to the Supreme Court was "whether the requirement that  
23 respondents finance such generic advertising is a law 'abridging  
24 the freedom of speech' within the meaning of the First  
25 Amendment." 521 U.S. at 460-461. The Supreme Court discussed  
26 the Ninth Circuit's conclusion that Government enforced

1 contributions to pay for generic advertising violated the First  
2 Amendment rights of the handlers:

3 Relying on an earlier Ninth Circuit decision  
4 that had cited our decision in *Abood v.*  
5 *Detroit Bd. of Ed.*, 431 U.S. 209 (1977), see  
6 *Cal-Almond, Inc. v. United States Dept. of*  
7 *Agriculture*, 14 F.3d 429 (CA9 1993), the  
8 court began by stating that the 'First  
9 Amendment right of freedom of speech includes  
10 a right not to be compelled to render  
11 financial support for others' speech.' 58  
12 F.3d at 1377. It then reviewed the generic  
13 advertising regulations under 'the test for  
14 restrictions on commercial speech set out in  
15 *Central Hudson Gas & Electric Corp. ... Id.*  
16 at 1378. Although it was satisfied that the  
17 Government interest in enhancing returns to  
18 peach and nectarine growers was substantial,  
19 it was not persuaded that generic advertising  
20 passed either the second or third 'prongs' of  
21 *Central Hudson*. With respect to the former,  
22 even though the generic advertising  
23 'undoubtedly' has increased peach and  
24 nectarine sales, the Government failed to  
25 prove that it did so more effectively than  
26 individualized advertising. The court also  
concluded that the program was not 'narrowly  
tailored' because it did not give the  
handlers any credit for their own advertising  
and because California was the only state in  
which such programs were in place.

18 521 U.S. at 465-466. The Supreme Court left undisturbed  
19 respondents' content-based challenge to the constitutionality of  
20 the generic advertising program, arising from their claimed  
21 disagreement with the content of some of the generic advertising.  
22 The Ninth Circuit did not rely on this claim in invalidating the  
23 advertising program; rather the generic advertising program was  
24 struck down "on the theory that the program could not survive  
25 *Central Hudson* because the Government had failed to prove that  
26 generic advertising was more effective than individual

1 advertising in increasing consumer demand for California  
2 nectarines, plums, and peaches." *Id.* at 467. The Supreme Court  
3 reasoned that the Ninth Circuit's "holding did not depend at all  
4 on either the content of the advertising, or on the respondents'  
5 claimed disagreement with any particular message" and that  
6 respondents' arguments about their disagreement with particular  
7 messages, "while perhaps calling into question the administration  
8 of portions of the program, have no bearing on the validity of  
9 the entire program." *Id.* at 467-468. The Supreme Court then  
10 stated:

11 For purposes of our analysis, we neither  
12 accept nor reject the factual assumption  
13 underlying the Court of Appeals' invalidation  
14 of the program - namely, that generic  
15 advertising may not be the most effective  
16 method of promoting the sale of these  
17 commodities. The legal question that we  
18 address is whether being compelled to fund  
19 this advertising raises a First Amendment  
20 issue for us to resolve, or rather is simply  
21 a question of economic policy for Congress  
22 and the Executive to resolve.

23 In answering that question we stress the  
24 importance of the statutory context in which  
25 it arises. California nectarines and peaches  
26 are marketed pursuant to detailed marketing  
orders that have displaced many aspects of  
independent business activity that  
characterize other portions of the economy in  
which competition is fully protected by the  
antitrust laws. The business entities that  
are compelled to fund the generic advertising  
at issue in this litigation do so as a part  
of a broader collective enterprise in which  
their freedom to act independently is already  
constrained by the regulatory scheme. It is  
in this context that we consider whether we  
should review the assessments used to fund  
collective advertising, together with other  
collective activities, under the standard

1 appropriate for the review of economic  
2 regulation or under a heightened standard  
3 appropriate for the review of First Amendment  
4 issues.

5 *Id.* at 468-469. The Supreme Court held that three  
6 characteristics of the generic advertising program mandated by  
7 the marketing orders distinguished it from laws that have been  
8 found to abridge the freedom of speech protected by the First  
9 Amendment: "First, the marketing orders impose no restraint on  
10 the freedom of any producer to communicate any message to any  
11 audience. Second, they do not compel any person to engage in any  
12 actual or symbolic speech. Third, they do not compel the  
13 producers to endorse or to finance any political or ideological  
14 views." *Id.* at 460-470. The Supreme Court found the fact the  
15 marketing orders imposed no restraint on the freedom of any  
16 producer to communicate any message to any audience,  
17 "distinguishes the limits on commercial speech at issue in  
18 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*,  
19 447 U.S. 557 (1980), *Virginia Bd. of Pharmacy v. Virginia*  
20 *Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and 44  
21 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)." *Id.* at  
22 469 n.12.

23 The Supreme Court rejected the argument that the assessments  
24 for generic advertising impinge on First Amendment rights because  
25 they reduce the amount of money the producers have to conduct  
26 their own advertising, holding that "[t]he fact that an economic  
regulation may indirectly lead to a reduction in a handler's

1 individual advertising budget does not itself amount to a  
2 restriction on speech." *Id.* at 470. The Supreme Court noted  
3 that the Ninth Circuit had accepted the argument that the  
4 assessments infringe First Amendment rights because they  
5 constitute compelled speech, *id.* at 470, but reversed by finding  
6 the assessments do not constitute compelled speech in violation  
7 of the First Amendment because "[t]he use of the assessments to  
8 pay for advertising does not require respondents to repeat an  
9 objectionable message out of their own mouths, ... [or] require  
10 them to use their own property to convey an antagonistic  
11 ideological message ..., [or] force them to respond to a hostile  
12 message when they 'would prefer to remain silent,' ... or require  
13 them to be publicly identified or associated with another's  
14 message ...". *Id.* at 471.

15 The Supreme Court addressed the Ninth Circuit's reliance on  
16 *Abood* that the First Amendment prohibits compelling an individual  
17 to contribute financial support for another's speech without  
18 sufficient justification by the government:

19 ... However, *Abood*, and the cases that follow  
20 it, did not announce a broad First Amendment  
21 right not to be compelled to provide  
22 financial support for any organization that  
23 conducts expressive activities. Rather,  
24 *Abood* merely recognized a First Amendment  
25 interest in not being compelled to contribute  
26 to an organization whose expressive  
activities conflict with one's 'freedom of  
belief.' 431 U.S. at 235. We considered, in  
*Abood*, whether it was constitutional for the  
State of Michigan to require government  
employees who objected to unions or union  
activities to contribute to an 'agency shop'  
arrangement requiring all employees to pay

1 union dues as a condition of employment. We  
2 held that compelled contributions to support  
3 activities related to collective bargaining  
4 were 'constitutionally justified by the  
5 legislative assessment of the important  
6 contribution of the union shop' to labor  
7 relations. *Id.*, at 222. Relying on our  
8 compelled-speech cases, however, the Court  
9 found that compelled contributions for  
10 political purposes unrelated to collective  
11 bargaining implicated First Amendment  
12 interests because they interfere with the  
13 values lying at the 'heart of the First  
14 Amendment[ -] the notion that an individual  
15 should be free to believe as he will, and  
16 that in a free society one's beliefs should  
17 be shaped by his mind and his conscience  
18 rather than coerced by the State.' *Id.*, 234-  
19 235; see also *id.*, at 235.

20 Here, however, requiring respondents to pay  
21 the assessments cannot be said to engender  
22 any crisis of conscience. None of the  
23 advertising in this record promotes any  
24 particular message other than encouraging  
25 consumers to buy California tree fruit.  
26 Neither the fact that respondents may prefer  
to foster that message independently in order  
to promote and distinguish their own  
products, nor the fact that they think more  
or less money should be spent fostering it,  
makes this case comparable to those in which  
an objection rested on political or  
ideological disagreement with the content of  
the message. The mere fact that objectors  
believe their money is not being well spent  
'does not mean [that] they have a First  
Amendment complaint.' ....

*Id.* at 471-472. The Supreme Court recognized cases that permit  
assessments to fund a lawful collective program "may sometimes be  
used to pay for speech over the objections of some members of the  
group":

Thus, in *Lehnert v. Ferris Faculty Assn.*, 500  
U.S. 507 (1991), while we held that the cost  
of certain publications that were not germane  
to collective-bargaining activities could not

1 be assessed against dissenting union members,  
2 *id.*, at 527-528, we squarely held that it was  
3 permissible to charge them for those portions  
4 of 'the Teachers' Voice that concern teaching  
5 and education generally, professional  
6 development, unemployment, job opportunities,  
7 award programs ..., and other miscellaneous  
8 matters.' *Id.*, at 529. That holding was an  
9 application of the rule announced in *Abood*  
10 and further refined in *Keller v. State Bar of*  
11 *Cal.*, 496 U.S. 1 (1990), a case involving bar  
12 association activities.

13 As we pointed out in *Keller*, '*Abood* held that  
14 a union could not expend a dissenting  
15 individual's dues for ideological activities  
16 not "germane" to the purpose for which  
17 compelled association was justified:  
18 collective bargaining. Here, the compelled  
19 association and integrated bar are justified  
20 by the State's interest in regulating the  
21 legal profession and improving the quality of  
22 legal services. The State Bar may therefore  
23 constitutionally fund activities germane to  
24 those goals out of the mandatory dues of all  
25 members. It may not, however, in such manner  
26 fund activities of an ideological nature  
which fall outside of those areas of  
activity.' *Id.*, at 13-14. This test is  
clearly satisfied in this case because (1)  
the generic advertising of California peaches  
and nectarines is unquestionably germane to  
the purposes of the marketing orders and, (2)  
in any event, the assessments are not used to  
fund ideological activities.

19 We are not persuaded that any greater weight  
20 should be given to the fact that some  
21 producers do not wish to foster generic  
22 advertising than to the fact that many of  
23 them may well object to the marketing orders  
24 themselves because they might earn more money  
25 in an unregulated market. Respondents'  
26 criticisms of generic advertising provide no  
basis for concluding that factually accurate  
advertising constitutes an abridgement of  
anybody's right to speak freely. Similar  
criticisms might be directed at other  
features of the regulatory orders that impose  
restraints on competition that arguably  
disadvantage particular producers for the



1 benefit of the entire market. Although one  
2 may indeed question the wisdom of such a  
3 program, its debatable features are  
4 insufficient to warrant special First  
5 Amendment scrutiny. It was therefore error  
6 for the Court of Appeals to rely on *Central*  
7 *Hudson* for the purpose of testing the  
8 constitutionality of market order assessments  
9 for promotional advertising.

10 *Id.* at 473-474. In so holding, the Supreme Court noted:

11 The Court of Appeals fails to explain why the  
12 *Central Hudson* test, which involved a  
13 restriction on commercial speech, should  
14 govern a case involving the compelled funding  
15 of speech. Given the fact that the Court of  
16 Appeals relied on *Abood* for the proposition  
17 that the program implicates the First  
18 Amendment, it is difficult to understand why  
19 the Court of Appeals did not apply *Abood*'s  
20 'germaneness' test.'

21 *Id.*, at 474 n.18. The Supreme Court held that application of the  
22 *Central Hudson* test "is inconsistent with the very nature and  
23 purpose of the collective action program at issue here":

24 The Court of Appeals concluded that the  
25 advertising program does not 'directly  
26 advance' the purposes of the marketing orders  
because the Secretary had failed to prove  
that generic advertising is any more  
effective in stimulating consumer demand for  
the commodities than the advertising that  
might otherwise be undertaken by producers  
acting independently. We find this an odd  
burden of proof to assign to the  
administration of marketing orders that  
reflect a policy of displacing unrestrained  
competition with Government supervised  
cooperative marketing programs. If there  
were no marketing orders at all to set  
maturity levels, size, quantity, and other  
features, competition might well generate  
greater production of nectarines, peaches,  
and plums. It may also be true that if there  
were no generic advertising, competition  
would generate even more advertising and an  
even larger consumer demand than does the



1 cooperative program. But the potential  
2 benefits of individual advertising do not  
3 bear on the question whether generic  
4 advertising directly advances the statute's  
5 collectivist goals. Independent advertising  
6 would be primarily motivated by the  
7 individual competitor's interest in  
8 maximizing its own sales, rather than in  
9 increasing the overall consumption of a  
10 particular commodity. While the First  
11 Amendment unquestionably protects the  
12 individual producer's right to advertise its  
13 own brands, the statute is designed to  
14 further the economic interests of the  
15 producers as a group. The basic policy  
16 decision that underlies the entire statute  
17 rests on an assumption that in the volatile  
18 markets for agricultural commodities the  
19 public will be best served by compelling  
20 cooperation among producers in making  
21 economic decisions that would be made  
22 independently in a free market. It is  
23 illogical, therefore, to criticize any  
24 cooperative program authorized by this  
25 statute on the ground that competition would  
26 provide greater benefits than joint action.

*Id.* at 475.

2. United States v. United Foods, Inc.

In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001),  
respondent challenged assessments used primarily to fund  
advertisements promoting mushroom sales pursuant to the Mushroom  
Promotion, Research, Consumer Information Act, 7 U.S.C. §§ 6101  
*et seq.* The Act authorizes the Secretary of Agriculture to  
establish a Mushroom Council to pursue the statute's goals.  
Mushroom producers and importers, as defined by the Act, submit  
nominations from among their group to the Secretary, who then  
designates Council membership. To fund its programs, the Act  
allows the Mushroom Council to impose mandatory assessments upon

1 handlers of fresh mushrooms, which assessments can be used for  
2 "projects of mushroom promotion, research, consumer information,  
3 and industry information". It was undisputed that most of the  
4 assessments were spent on generic advertising to promote mushroom  
5 sales. The district court granted summary judgment for the  
6 United States based on *Glickman*. The Sixth Circuit reversed,  
7 holding that *Glickman* did not control because the mandated  
8 payments were not part of a comprehensive statutory agricultural  
9 marketing program. The Supreme Court affirmed the Sixth  
10 Circuit's decision that *Glickman* is not controlling. In so  
11 doing, the Supreme Court specified three issues that it was not  
12 addressing:

13           We have used standards for determining the  
14           validity of speech regulations which accord  
15           less protection to commercial speech than to  
16           other expressions ... That approach, in turn,  
17           has been subject to some criticism ... We  
18           need not enter into the controversy, for even  
19           viewing commercial speech as entitled to  
20           lesser protection, we find no basis under  
21           either *Glickman* or our other precedents to  
22           sustain the compelled assessments sought in  
23           this case. It should be noted, moreover,  
24           that the Government itself does not rely upon  
25           *Central Hudson* to challenge the Court of  
26           Appeals' decision ... and we therefore do not  
27           consider whether the Government's interest  
28           could be considered substantial for purposes  
29           of the *Central Hudson* test. The question is  
30           whether the government may underwrite and  
31           sponsor speech with a certain viewpoint using  
32           special subsidies exacted from a designated  
33           class of persons, some of whom object to the  
34           idea being advanced.

35 *Id.* at 409-410. The Supreme Court refused to address the  
36 Government's contention that the advertising is government speech

1 immune from First Amendment scrutiny under *Lebron v. National*  
2 *Passenger Railroad Corporation*, 513 U.S. 374 (1995) because the  
3 Government had not raised this argument below. *Id.* at 416-417.  
4 In affirming the Sixth Circuit, the Supreme Court noted that the  
5 First Amendment may prevent the government from compelling  
6 individuals to express certain views, that "First Amendment  
7 concerns apply here because of the requirement that producers  
8 subsidize speech with which they disagree", and that "the  
9 compelled funding for the advertising must pass First Amendment  
10 scrutiny." *Id.*, at 410-411. The Supreme Court distinguished  
11 *Glickman* because "[t]he program sustained in *Glickman* differs  
12 from the one under review in a most fundamental respect":

13           In *Glickman* the mandated assessments for  
14           speech were ancillary to a more comprehensive  
15           program restricting marketing autonomy.  
16           Here, for all practical purposes, the  
17           advertising itself, far from being ancillary,  
18           is the principle object of the regulatory  
19           scheme.

20 *Id.*, at 411-412. The Supreme Court concluded:

21           The features of the marketing scheme found  
22           important in *Glickman* are not present in the  
23           case before us ... [A]lmost all of the funds  
24           collected under the mandatory assessments are  
25           for one purpose: generic advertising. Beyond  
26           the collection and disbursement of  
27           advertising funds, there are no marketing  
28           orders that regulate how mushrooms may be  
29           produced and sold, no exemption from the  
30           antitrust laws, and nothing preventing  
31           individual producers from making their own  
32           marketing decisions. As the Court of Appeals  
33           recognized, there is no 'heavy regulation  
34           through marketing orders' in the mushroom  
35           market ... Mushroom producers are not forced  
36           to associate as a group which makes  
37           cooperative decisions. '[T]he mushroom

1 growing business ... is unregulated, except  
2 for the enforcement of a regional mushroom  
3 advertising program,' and 'the mushroom  
4 market has not been collectivized, exempted  
from antitrust laws, subjected to a uniform  
price, or otherwise subsidized through price  
supports or restrictions on supply.' ....

5 *Id.*, at 412-413. Although the mushroom generic advertising  
6 assessment only required the individual to support speech by  
7 others, the Supreme Court concluded that "the mandated support is  
8 contrary to First Amendment principles set forth in cases  
9 involving expression by groups which include persons who object  
10 to the speech, but who, nevertheless, must remain members of the  
11 group by law or necessity", citing *Abood v. Detroit Bd. of*  
12 *Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of Cal.*,  
13 496 U.S. 1 (1990). The Supreme Court rejected the Government's  
14 argument that, despite the lack of cooperative marketing, the  
15 *Abood* rule protecting against compelled speech is inapplicable:

16 ... We did say in *Glickman* that *Abood*  
17 'recognized a First Amendment interest in not  
18 being compelled to contribute to an  
organization whose expressive activities  
19 conflict with one's "freedom of belief."' 521  
20 U.S., at 471 (quoting *Abood*, 431 U.S., at  
21 235). We take further instruction, however,  
22 from *Abood*'s statement that speech need not  
be characterized as political before it  
receives First Amendment protection. *Id.*, at  
23 232. A proper application of the rule in  
24 *Abood* requires us to invalidate the instant  
statutory scheme. Before addressing whether  
25 a conflict with freedom of belief exists, a  
threshold inquiry must be whether there is  
26 some state imposed obligation which makes  
group membership less than voluntary; for it  
is only the overriding associational purpose  
which allows any compelled subsidy for speech  
in the first place. In *Abood*, the  
infringement upon First Amendment

1 associational rights worked by a union shop  
2 arrangement was 'constitutionally justified  
3 by the legislative assessment of the  
4 important contribution of the union shop to  
5 the system of labor relations established by  
6 Congress.' *Id.*, at 222. To attain the  
desired benefit of collective bargaining,  
union members and nonmembers were required to  
associate with one another, and the  
legitimate purposes of the group were  
furthered by the mandated association.

7 A similar situation obtained in *Keller v.*  
8 *State Bar of Cal.*, ... A state-mandated,  
9 integrated bar sought to ensure that 'all of  
10 the lawyers who derive benefit from the  
11 unique status of being among those admitted  
12 to practice before the courts [were] called  
13 upon to pay a fair share of the cost.' *Id.*,  
14 at 12. Lawyers could be required to pay  
15 moneys in support of activities that were  
16 germane to the reason justifying the  
17 compelled association in the first place, for  
18 example, expenditures (including expenditures  
19 for speech) that related to 'activities  
20 connected with disciplining members of the  
21 Bar or proposing ethical codes for the  
22 profession.' *Id.*, at 16. Those who were  
23 required to pay a subsidy for the speech of  
24 the association already were required to  
25 associate for other purposes, making the  
26 compelled contribution of moneys to pay for  
expressive activities a necessary incident of  
a larger expenditure for an otherwise proper  
goal requiring the cooperative activity. The  
central holding in *Keller*, moreover, was that  
the objecting members were not required to  
give speech subsidies for matters not germane  
to the larger regulatory purpose which  
justified the required association.

*Id.*, at 413-414. The Supreme Court held:

The statutory scheme as it relates to  
handlers of mushrooms is concedely different  
from the scheme in *Glickman*; here the statute  
does not require group action, save to  
generate the very speech to which some  
handlers object. In contrast to the program  
upheld in *Glickman*, where the Government  
argued the compelled contributions for

1 advertising were 'part of a far broader  
2 regulatory system that does not principally  
3 concern speech,' ... there is no broader  
4 regulatory system in place here. We have not  
5 upheld compelled subsidies for speech in the  
6 context of a program where the principal  
7 object is speech itself. Although greater  
8 regulation of the mushroom market might have  
9 been implemented under the [AMAA], the  
10 compelled contributions for advertising are  
11 not part of some broader regulatory scheme.  
12 The only program the Government contends the  
13 compelled contributions serve is the very  
14 advertising scheme in question. Were it  
15 sufficient to say speech is germane to  
16 itself, the limits observed in *Abood* and  
17 *Keller* would be empty of meaning and  
18 significance. The cooperative marketing  
19 structure relied upon by the majority of the  
20 Court in *Glickman* to sustain an ancillary  
21 assessment finds no corollary here; the  
22 expression respondent is required to support  
23 is not germane to a purpose related to an  
24 association independent from the speech  
25 itself; and the rationale of *Abood* extends to  
26 the party who objects to the compelled  
support for this speech. For these and other  
reasons we have set forth, the assessments  
are not permitted under the First Amendment.

*Id.*, at 413-416.

3. *Delano Farms Co. v. California Table Grape*  
*Com'n.*

In *Delano Farms Co. v. California Table Grape Com'n.*, *supra*,  
318 F.3d 895, the Ninth Circuit, ruling on Plaintiffs' appeal  
from the stipulated dismissal under Rule 12(b)(6) entered in this  
action, addressed as the only issue, whether the principle  
distinguishing *Glickman* and *United Foods* makes this case more  
like *Glickman* or more like *United Foods*. *Id.*, at 896. The Ninth  
Circuit set forth the facts as follows:

In 1967, a California statute called the

1 Ketchum Act established the California Table  
2 Grape Commission for 'the promotion of the  
3 sale of fresh grapes for human consumption by  
4 means of advertising, dissemination of  
5 information' and other means. The  
6 Commission's Policy Statement says that its  
7 purpose is to aid 'producers of California  
8 fresh grapes in preventing economic waste in  
9 the marketing of their commodity,' and in  
10 acting 'in the public interest to protect and  
11 enhance the reputation of California fresh  
12 grapes for human consumption in intrastate,  
13 interstate and foreign markets.' It promotes  
14 the sale of grapes, by advertising the  
15 desirability of California grapes and also by  
16 negotiating with foreign governments to  
17 prevent and eliminate trade barriers against  
18 California grapes. It also lobbies  
19 government officials on grape-related matters  
20 and contributes to various good works such as  
21 science fair scholarships, 4-H Club grants,  
22 scholarships to children of grape field  
23 workers, and contributions to the Audubon  
24 Society.

The Commission has the statutory power to  
levy assessments 'upon all fresh grapes  
shipped during each marketing season' to pay  
for generic advertising, marketing, market  
research and development, and merchandising.

*Id.*, at 896-897. In reversing the stipulated dismissal, the  
Ninth Circuit, after describing the holdings in *Glickman* and  
*United Foods*, ruled:

Doubtless many cases will arise that are hard  
to place on one side or the other of the  
*Glickman-United Foods* distinction, but this  
isn't one of them. Just as in the mushroom  
case, the scheme does not collectivize the  
industry, about 90% of the assessment money  
is spent on generic promotional activities,  
and there is no antitrust exemption. Delano  
Farms, Susan Neill, and Lucas Brothers, sell  
brand name grapes and have an interest in  
promoting their brands rather than and to  
some extent at the expense of grapes in  
general.



1 The Table Grape Commission argues that grapes  
2 are regulated by various California statutes  
3 addressing such matters as testing equipment  
4 and standards for fruit maturity, container  
5 standards, federal regulation of grading  
6 standards (e.g., what does 'extra fancy'  
7 mean?), and quality standards for exported  
8 grapes. There is a 'marketing order' of the  
9 collective sort in one location, though not  
10 applicable to the issue in the case at bar.  
11 Such consumer protection and information  
12 regulations apply to much of the economy, and  
13 are far from rising to the level of the  
14 collectivization that controlled the result  
15 in *Glickman*. Nor does the Commission attempt  
16 to show mushrooms are not similarly  
17 regulated, and, being food products that can  
18 poison people if not properly grown,  
19 harvested, labeled and sold, they probably  
20 are.

21 ...

22 We of course intimate no views on economic  
23 policy. The distinction between *Glickman* and  
24 *United Foods* does not turn of evaluation of  
25 the merits of competing policy concerns. The  
26 grape growers do not operate under the 1937  
statute [AMAA] that substituted 'collective  
action' for the 'aggregate of consequences of  
independent competitive choices' and  
expressly exempted them from the antitrust  
laws, as did the ... producers in *Glickman*  
... Rather, the business practices by the  
instant growers are governed by a statute  
similar to the one at issue in *United Foods*,  
so they are entitled to First Amendment  
protections against state compulsion to fund  
generic advertising.

21 *Id.*, at 899-900.

22 The *Delano Farms* decision accepted as true allegations of  
23 the complaint about the table grape industry and Commission that  
24 have been amplified or disproved by the evidentiary submissions  
25 in this case.

26 4. Law of the Case.



1 Plaintiffs contend that the Ninth Circuit's ruling in *Delano*  
2 *Farms v. California Table Grape Commission* controls resolution of  
3 this issue as it is "the law of the case," arguing that "the  
4 Ninth Circuit - in this very case - stated that *United Foods* -  
5 NOT *GLICKMAN* - control [sic] the outcome of this case."

6 "The law of the case doctrine is a judicial invention  
7 designed to aid in the efficient operation of court affairs."  
8 *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715  
9 (9<sup>th</sup> Cir.1990). Under the doctrine, a court is generally  
10 precluded from reconsidering an issue previously decided by the  
11 same court or a higher court in the identical case. *Id.* "For  
12 the doctrine to apply, the issue in question must have been  
13 'decided explicitly or by necessary implication in [the] previous  
14 disposition.'" *United States v. Lummi Indians*, 235 F.3d 443, 452  
15 (9<sup>th</sup> Cir.2000). Application of the doctrine is discretionary.  
16 *Id.* A court abuses its discretion in applying the law of the  
17 case doctrine only if (1) the first decision was clearly  
18 erroneous; (2) an intervening change in the law occurred; (3) the  
19 evidence on remand was substantially different; (4) other changed  
20 circumstances exist; or (5) a manifest injustice would otherwise  
21 result. *United States v. Cuddy*, 147 F.3d 1111, 1114 (9<sup>th</sup>  
22 Cir.1998).

23 In the Order which denied Plaintiffs' motion for judgment on  
24 the pleadings on this very issue, the trial court ruled in  
25 pertinent part:

26 The Appeals Court, in *Delano Farms*, could

1 decide no more than the issue before it,  
2 whether the amended complaint failed to state  
3 a claim under Rule 12(b)(6). The Appeals  
4 Court '[took] all of the allegations of  
5 material fact stated in the complaint as true  
6 and construed them in the light most  
7 favorable to the nonmoving party [i.e.,  
8 Plaintiffs].' On a motion attacking the  
9 sufficiency of the complaint, the Circuit  
10 Court could not make evidentiary findings  
11 resolving disputed questions of fact or  
12 credibility. Rather, it construed the  
13 complaint's factual assertions in the light  
14 most favorable to Plaintiffs, the non-moving  
15 parties. The Ninth Circuit relied upon the  
16 following facts, which are disputed by  
17 Defendant's answer: that (1) the 1937 [sic]  
18 statute created a grape 'scheme [that] does  
19 not collectivize the industry;' (2) about 90%  
20 of the assessment money is spent on generic  
21 promotional activities;' (3) 'there is no  
22 antitrust exemption' for the Commission  
23 present in the 1937 [sic] statute; and (4)  
24 that the Plaintiffs sell 'brand name grapes  
25 and have an interest in promoting their  
26 brands rather than and to some extent at the  
expense of grapes in general.' *Delano Farms*,  
318 F.3d at 899. Accepting these facts as  
true, the Court of Appeal found the complaint  
stated a First Amendment claim based on  
*United Foods*, distinguished from *Glickman*.  
The operative effect of this ruling reverses  
the dismissal and reinstate [sic] the amended  
complaint. The Appeals Court did not grant  
judgment to Plaintiffs, nor did it remand the  
case to the district court with instructions  
to do so. In determining the meaning of an  
appellate decision, the trial court must look  
to the Appeals Court's dispositive language  
and any directions to the lower court. Here,  
the judgment of dismissal was reversed and  
the case was remanded for further  
proceedings. No direction is provided to the  
trial court.

Plaintiffs' motion for judgment on the  
pleadings, assumes the Court of Appeals  
finally decided the case and that there are  
no disputed issues of fact or law raised by  
the amended complaint. Under Rule 12(c)  
standards, for Plaintiffs to prevail, all the

1       allegations of the Defendant's answers must  
2       be accepted as true and inferences drawn  
3       against the moving party. The moving party  
4       is entitled to judgment as a matter of law  
5       only when the facts asserted do not  
6       constitute a defense as a matter of law and  
7       there are no factual issues to be tried. The  
8       facts upon which the Plaintiff's [sic] motion  
9       is based, though assumed to be true for  
10      purpose of appellate review, are disputed in  
11      the trial court. There has been no  
12      evidentiary resolution by a hearing or trial.  
13      The Appeals Court assumed Plaintiffs' factual  
14      allegations to be true, that the Defendant's  
15      table grape program is more like the mushroom  
16      program in *United Foods* than the tree fruit  
17      program in *Glickman*. However, Defendant's  
18      answer alleges, *inter alia*, that the  
19      California regulatory scheme has  
20      collectivized the table grape industry; that  
21      competition has been expressly displaced by  
22      the Cartwright Act (state antitrust law)  
23      exemption; that less than 70% of the  
24      assessments are for generic speech purposes;  
25      and that there are industry programs for  
26      which assessments on industry members can  
    lawfully be made, such as crop-quality  
    research, and non-speech marketing  
    activities, opening foreign markets.  
    Plaintiffs dispute all these allegations.  
    These disputes cannot be resolved without an  
    evidentiary hearing.

...

18       The extent of California table grape  
19       collectivization is the most important factor  
20       in determining whether the table grape  
21       program more closely resembles the tree fruit  
22       program or the mushroom program.  
23       Collectivization exists when 'mandatory  
24       assessments that fund[] a broad regulatory  
25       apparatus that include[s], as one of its many  
26       programs, promotional advertising. *Mich.*  
    *Port [sic] Producers Ass'n v. Beneman [sic]*.  
    No. 02-2337/02-2338, 2003 U.S.App. LEXIS  
    21358, at \*13 (6<sup>th</sup> Cir. Oct. 22, 2003).  
    Whether the Defendant's activities meet  
    *Glickman's* 'comprehensive' or  
    'collectivization' test, or are ancillary to  
    the advertising and are governed by *United*

1        *Foods*, present unresolved factual disputes.  
2        Plaintiffs assert, but have not yet proven,  
3        that they sell their grapes under a 'brand  
4        name' or 'under the high end labels' and do  
5        not benefit from generic advertising.  
6        Defendant denies this allegation and alleges  
7        Plaintiffs do 'benefit' from the Commission's  
8        programs ... This dispute cannot be resolved  
9        as a matter of law without evidence. If the  
10       Commission can show that its 'generic  
11       advertising assessments were "ancillary to a  
12       more comprehensive program restricting  
13       marketing autonomy"' that benefitted the  
14       Plaintiffs, the table grape program may be  
15       lawful under *Glickman*. *Delano*, 318 F.3d at  
16       898.

17       The parties must be allowed to develop a full  
18       factual record to permit fair and orderly  
19       resolution of this dispute over the  
20       regulation of California table grapes by the  
21       Commission. The Supreme Court's decision in  
22       *United Foods* leaves open two questions of  
23       law, (1) collectivization and displacement of  
24       competition, and (2) whether non-speech  
25       program activities benefit Plaintiffs.

26       Plaintiffs' argument that the "law of the case" doctrine  
27       makes *United Foods* binding, irrespective of the facts, is without  
28       merit and has been previously rejected in the ruling on the  
29       motion for judgment on the pleadings.

30       5. Plaintiffs' Factual Position that *United Foods*  
31       Applies.

32       Plaintiffs emphasize the following undisputed facts in  
33       contending that *United Foods* applies:

34       PUF No. 38: The Table Grape Commission has no authority to  
35       set the minimum prices nor the maximum prices that shippers pay  
36       to producers. A shipper can sell its grapes for whatever price  
37       it wants and there are no state or federal regulations that

1 control or regulate price.

2 Although the Commission contends that whether it has the  
3 authority to set minimum prices is a legal conclusion to which it  
4 need not respond, the Commission admits this fact with the  
5 clarification "that state and federal regulations do not impose  
6 any *direct* price controls on table grapes. This fact is  
7 undisputed.

8 PUF No. 39: The state does not set any federal or state  
9 quantity restrictions on grapes to be produced or shipped in the  
10 San Joaquin Valley. There is no pro-rate for California table  
11 grapes. There are no federal marketing orders for table grapes  
12 produced in the San Joaquin Valley. The Ketchum Act has no  
13 quality, maturity or packaging requirements.

14 The Commission admits "with the clarification that there are  
15 no *direct* quantity restrictions on grape production and  
16 shipment", but denies this fact "insofar as State maturity and  
17 quality regulations and federal export standards have the effect  
18 of limiting the quantity of table grapes produced and shipped in  
19 the United States." The Commission's denial relies on  
20 paragraphs 3-5 and 7 of the Declaration of James Pandol, a  
21 California table grape grower and marketer based in Delano, who  
22 avers in pertinent part:

23 2. I am a third-generation California table  
24 grape grower. I have spent most of my career  
25 as vice president of marketing for my  
26 family's table grape business. I was  
previously the president and majority  
shareholder of a fresh mushroom growing and  
shipping business based in California.

1           3. Table grapes shipped in California are  
2           subject to a number of state regulations,  
3           including regulations imposing minimum  
4           maturity requirements, minimum quality  
5           standards, and packaging and labeling  
6           requirements. California table grapes  
7           exported abroad are also subject to federal  
8           quality, maturity, and labeling regulations.  
9           All of these regulations impact the way I and  
10          other California table grape grower/shippers  
11          do business. The regulations limit what we  
12          can and cannot do by imposing standards and  
13          other requirements that we all have to meet  
14          if we want to ship our fruit. The  
15          regulations require all California table  
16          grape growers and shippers to follow the same  
17          rules in order to maintain demand for  
18          California table grapes. Almost all of these  
19          regulations, in fact, were developed with  
20          input from the table grape industry.

21          4. The California maturity regulations  
22          require growers to leave grapes on the vine  
23          long enough to make sure that the sugar  
24          content of the grapes reaches a required  
25          minimum level. The regulations prevent  
26          growers from attempting to take advantage of  
27          high early market prices by selling immature,  
28          sour grapes, which would turn off customers  
29          and weaken demand for all California grapes.  
30          By prohibiting growers from picking and  
31          selling grapes too early, the regulations  
32          help the entire industry maintain demand for  
33          California grapes. In the absence of a  
34          mandatory rule requiring all growers to  
35          market only mature fruit, there would likely  
36          be a small group of growers that would try to  
37          ship their fruit early (when prices are high)  
38          even though doing so hurts all of the growers  
39          who ship their grapes later, after the grapes  
40          have matured.

41          5. The California quality regulations also  
42          have the effect of limiting sales of  
43          California grapes for the collective benefit  
44          of all California growers. The regulations  
45          prohibit the shipment of table grapes that  
46          are damaged due to insects, mold, decay,  
47          freezing, sunburn, and other conditions. By  
48          keeping low-quality grapes off the market,  
49          the California regulations ensure that

1 overall consumer demand for California table  
2 grapes is not adversely affected by the self-  
3 interested decisions of individual  
4 grower/shippers to try to sell poor quality  
5 fruit.

6 ...

7 7. Finally, federal regulations governing  
8 exports of California table grapes limit the  
9 quantity and quality of California grapes  
10 exported. Depending upon the country to  
11 which a shipment is destined, federal  
12 regulations require the grapes shipped to  
13 meet certain USDA grade quality standards.  
14 The industry pushed for development of these  
15 standards because without them some  
16 California table grape growers would likely  
17 export lower quality fruit, and it does not  
18 take much poor quality fruit to decrease  
19 demand in a market. By limiting the export  
20 of California table grapes to only those  
21 grapes that meet certain requirements,  
22 federal regulations benefit the entire  
23 industry by preventing shippers from taking  
24 actions that might be profitable to them in  
25 the short-run but that would hurt the entire  
26 industry in the long-run.

1 Plaintiffs object to Mr. Pandol's declaration, contending it  
2 "lacks foundation, is speculative, it is hearsay and conclusory  
3 as to what 'other grower/shippers' their business [sic]" and  
4 because it is irrelevant.

5 Plaintiffs' objections are sustained to the extent that the  
6 rules (state and federal) are the best evidence of their content.  
7 Mr. Padol may explain his understanding of how the rules apply to  
8 grape growers. The objections are sustained to how the rules and  
9 regulations are interpreted by others, but Mr. Pandol's opinions  
10 are admissible to describe the effect the rules have on his  
11 growing, harvesting, shipping and marketing practices.

1        PUF No. 40: There is no federal or state legislation, nor  
2 none in the Ketchum Act, that restricts the quantity of table  
3 grapes that can be sold. There is no law that forbids a shipper  
4 from dumping table grapes at a cheap price on the market. There  
5 are no federal or state regulations regarding price limitations  
6 for which a shipper can sell table grapes. The Table Grape  
7 Commission does not take title to grapes nor does the Table Grape  
8 Commission act as a cooperative in selling table grapes.

9        The Commission admits "with the clarification that antitrust  
10 and other laws may 'forbid[] a shipper from dumping table grapes  
11 at a cheap price on the market' and the further clarification  
12 that there are no *direct* quantity restrictions on grape sales or  
13 *direct* price controls for table grapes." Again relying on Mr.  
14 Pandol's declaration, the Commission denies the facts "insofar as  
15 "state maturity and quality regulations and federal export  
16 standards have the effect of limiting the quantity of table  
17 grapes sold."

18        PUF No. 41: The only regulation that the Ketchum Act has  
19 over the shipper is that the shipper is required to file reports  
20 regarding the sales of table grapes and to pay the assessments.

21        The Commission admits that the shippers are required to file  
22 reports and to pay assessments pursuant to the Ketchum Act, but  
23 denies "that they are the only regulations that could be imposed  
24 pursuant to the Ketchum Act." This fact is disputed. [OWW ???]

25        PUF No. 42: The Commission has no authority to impose volume  
26 control on the production or shipment of table grapes. There is



1 no authority to set minimum prices for what table grapes can be  
2 sold.

3 The Commission asserts that "[t]his is a legal contention to  
4 which the Commission need not respond." The Commission's  
5 opposition asserts that it has not moved for summary judgment on  
6 the "collectivization" issue, that there are issues of fact that  
7 preclude summary adjudication for Plaintiffs that *United Foods*  
8 rather than *Glickman* applies.

9 The Commission refers to state and federal regulations  
10 imposing restrictions on the growing and shipping of table  
11 grapes. The state regulations call for table grapes to be free  
12 from serious damage due to insects, mold, decay, freezing, and  
13 sunburn, Cal.Code.Reg. tit. 3 §§ 1436.18, 1436.24, define what  
14 constitutes "serious damage" in table grapes, *id.*, § 1436.19, and  
15 require a specific percentage of grapes in a container or bulk  
16 lot to be free from serious damage, *id.*, § 1436.20. Additional  
17 regulations impose minimum maturity requirements, *id.*, §§  
18 1436.12, 1436.17, 1436.18, specifying the sampling and testing  
19 methods for maturity, *id.*, §§ 1370.16, 1436.3, 1436.5, and set  
20 testing equipment standards, *id.*, §§ 1436.6, 1437.7. Other  
21 regulations prohibit mislabeling of varieties, proscribe the use  
22 of particular variety designations, *id.*, §§ 1436.30, 1436.31,  
23 1436.42, and provide detailed specifications of what containers  
24 may be used, how they must be packed, how they must be closed,  
25 *id.*, §§ 1436.37, 1436.38, 1380.19, and further requirements for  
26 grapes being shipped out of state, *id.*, § 1436.

1 Federal regulations define grades for table grapes, 7 C.F.R.  
2 §§ 51.1880-51.913, set the minimum standards for each grade,  
3 including requirements for berry size, maturity and firmness,  
4 bunch and stem characteristics, prohibited defects, and  
5 tolerances. Additional regulations impose quality, maturity and  
6 labeling requirements for grapes exported to foreign countries  
7 and require the shipper to obtain a certificate from the USDA  
8 that the grapes meet quality and labeling requirements imposed by  
9 the regulations. 7 C.F.R. §§ 35.11, 591. Federal statutory  
10 provisions and regulations govern fees for inspection and  
11 certification services, 7 U.S.C. § 595, when inspections must  
12 occur, 7 C.F.R. § 35.12, and the process for obtaining  
13 inspections and certifications, 7 C.F.R. §§ 51.-4-51.61.  
14 Moreover, a federal marketing order governs grapes grown in  
15 southeastern California.

16 The Commission maintains that these state and federal laws  
17 and regulations have the "practical effect" of collectivizing the  
18 California table grape industry, contending that, in a number of  
19 respects, independent business activity has been displaced by  
20 collective action. The Commission asserts that, to understand  
21 this "practical effect", the market for table grapes and the  
22 structure of the California table grape industry must be  
23 understood.

24 The Commission refers to the Undisputed Stipulated Facts  
25 that table grapes are not "branded" in the retail market and that  
26 consumers view table grapes as a commodity; that retailers do not

1 typically indicate the name of the grower/shipper on store  
2 signage displaying grapes; and that, most of the time, grapes'  
3 packaging does not reveal the grower/shippers' name. The  
4 Commission also submits evidence that the majority of consumers  
5 do not know the names of the grower/shippers; nor the labels  
6 under which the grower/shippers sell their grapes to wholesalers  
7 and retailers; and do not shop for grapes in the retail market  
8 with brand names in mind. Further evidence shows Plaintiffs'  
9 grapes are not branded at the consumer level and expert testimony  
10 based on a survey of primary grocery shoppers indicates that  
11 consumers do not know the Plaintiffs' "brand" names.

12 All of this evidence is said to demonstrate that consumers  
13 do not know the brands or labels of individual grape growers,  
14 "the fortunes of California table grape producers are  
15 inextricably bound together":

16 Where consumers do not differentiate between  
17 table grapes from different producers, each  
18 California table grape grower is dependent  
19 upon other growers not to sell poor quality  
20 grapes that will weaken demand across the  
21 board. In this environment, the maturity and  
22 quality regulations that govern the table  
23 grape industry are not mere 'consumer  
24 protection' regulations but are, more  
25 fundamentally, restrictions that table grape  
26 growers have urged the state and federal  
government to adopt in order to protect the  
industry and that serve to collectivize the  
industry.

This position is based primarily on the Pandol declaration.

Further evidence that the Ketchum Act collectivizes the  
table grape industry is found in the breadth of the Commission's

1 work, which reaches well beyond advertising and displaces  
2 individual firm activities in favor of collective activities.  
3 This includes the Commission's work to develop and patent better  
4 varieties of table grapes; to discover and publicize the health  
5 benefits of table grapes; to initiate better cultural practices;  
6 to open new markets; and to improve grape storage and handling.  
7 The Commission undertakes these actions on behalf of all  
8 California table grape growers for their collective benefit. The  
9 Commission describes its patenting activities of new grape  
10 varieties, which are made available to growers on certain terms.  
11 The Commission develops protocols for shipping table grapes to  
12 various foreign countries, has a constraining effect on the table  
13 grape industry, which further serves to collectivize the table  
14 grape industry.

15 From the totality of the circumstances: "[t]he practical  
16 effect of the regulatory regime governing the table grape  
17 industry stands in stark contrast to the regime governing the  
18 mushroom industry at issue in *United Foods*." The Commission  
19 relies on Mr. Pandol's declaration:

20 8. In contrast to California table grapes,  
21 shipments of fresh mushrooms are subject to  
22 exceedingly little government regulation.  
23 There are no federal or California quality  
24 restrictions, maturity standards, size  
25 standards, grade standards, or packaging  
26 requirements applicable specifically to  
mushrooms. The principal regulation  
affecting the marketing of mushrooms is the  
assessment paid to support the Mushroom  
Council. Because there are no maturity,  
size, or packaging regulations applicable to  
mushrooms, individual mushroom shippers

1 attempt to differentiate their mushrooms by  
2 varying maturity, size, or packaging. The  
3 absence of these regulations have made fresh  
mushrooms less of a 'commodity' product than  
other regulated products, like table grapes.

4 The Commission notes that the Supreme Court observed in *United*  
5 *Foods* that "[b]eyond the collection and disbursement of  
6 advertising funds, there are no marketing orders that regulate  
7 how mushrooms may be produced and sold, no exemption from the  
8 antitrust laws, and nothing preventing individual producers from  
9 making their own marketing decisions." No federal regulations  
10 for mushroom grade standards have been issued. In *United Foods*,  
11 the government was only able to refer to the federal statute  
12 establishing the Mushroom Council, which authorized the Mushroom  
13 Council to develop voluntary standards, and to the AMAA, pursuant  
14 to which a marketing order governing mushrooms could have been,  
15 but was not promulgated. Almost all of the Mushroom Council's  
16 activities were devoted to generic advertising; therefore, the  
17 Mushroom Council could not have displaced any significant aspect  
18 of independent business activity, comparable to the Commission's  
19 non-advertising activities in the table grape industry.

20 Plaintiffs' argument that the California table grape  
21 industry is not collectivized, rests largely on the fact that  
22 state and federal regulations do not directly regulate the price  
23 and volume of sales. The Commission counters that the absence of  
24 direct price and quantity regulation is not determinative, as the  
25 marketing order found constitutional in *Glickman* did not contain  
26 direct price or quantity restrictions and that, nonetheless, the

1 Supreme Court concluded that California tree fruit was marketed  
2 "pursuant to detailed marketing orders that have displaced many  
3 aspects of independent business activity." From this, the  
4 Commission argues, Plaintiffs' motion for summary adjudication  
5 that *United Foods* controls, rather than *Glickman*, should be  
6 denied.

7 Plaintiffs respond that the regulations and statutes now  
8 relied on by the Commission were presented to the Ninth Circuit  
9 in *Delano Farms*, and the Ninth Circuit ruled that "[s]uch  
10 consumer protection and information regulations apply to much of  
11 the economy, and are far from rising to the level of the  
12 collectivization that controlled the result in *Glickman*."  
13 Plaintiffs object to Mr. Pandol's averments as uninformed and  
14 irrelevant. Plaintiffs point to the Supreme Court's note in  
15 *Johanns, supra*, 544 U.S. at 558 n.3:

16 In *United Foods*, the Court distinguished (and  
17 the dissent relied on) *Glickman* ..., which  
18 upheld the use of mandatory assessments to  
19 fund generic advertising promoting California  
20 tree fruit. In *Glickman*, as in *United Foods*,  
21 the Government did not argue that the  
22 advertising was permissible government speech  
23 ... Rather, the Government contended, and we  
24 agreed, that compelled support for generic  
25 advertising was legitimately part of the  
26 Government's 'collectivist' centralization of  
the market for tree fruit ... Here, as in  
*United Foods*, 'there is no broader regulatory  
system in place' that collectivizes aspects  
of the beef market unrelated to speech, so  
*Glickman* is not controlling.

Plaintiffs emphasize that Ketchum Act has no maturity, quality,  
or packaging requirements and that producers of table grapes are

1 not regulated by state or federal law concerning price, quantity,  
2 volume, or shipping quotas. Plaintiffs contend that as with the  
3 mushroom growers in *United Foods*, table grape producers "are not  
4 forced to associate as a group which makes cooperative  
5 decisions." 533 U.S. at 413.

6 Plaintiffs discount the Commission's position that table  
7 grapes are not branded at the consumer level:

8 It is not even the beginning of [the] turning  
9 point as to whether or not the consumers  
10 observe the brand of table grapes. The  
11 consumers cannot buy any table grapes unless  
12 the retailers buy the branded grapes from the  
13 shippers like Plaintiffs. But in any event,  
14 it is not a collectivization of the industry,  
15 whether the consumers see the brand or not.

16 With regard to the Commission's evidence and argument that  
17 its programs and activities reach well beyond advertising,  
18 Plaintiffs rejoin that all of those "demand-enhancing"  
19 activities, i.e., research, trade management, issues management,  
20 education and outreach, domestic marketing, are "all speech  
21 related programs", they are not the regulatory programs that have  
22 collectivized the industry or required the compelled association  
23 for non-speech related regulatory programs that *United Foods* ...  
24 would countenance." Plaintiffs rely on a district court  
25 decision, *In re Washington State Apple Advertising Com'n, supra*,  
26 257 F.Supp.2d at 1302:<sup>6</sup>

Like *United Foods*, the Apple Commission's

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<sup>6</sup>Plaintiffs cite *Pork Producers Ass'n., Inc. v. Veneman, supra*, 348 F.3d at 163. For the reasons stated above, this case no longer constitutes valid authority.

1 essential purpose is the advertisements and  
2 other marketing which it produces. In the  
3 years 1998-99 through 2001-02, the Commission  
4 spent between 62.5% of 85% of its budget  
5 expenditures were spent on 'marketing'  
6 activities ... Those same spreadsheets  
7 reflect that while not all of that budget is  
8 allocated to 'consumer advertising,' the vast  
9 majority of 'marketing' expenditures fits  
10 within four categories: (1) publications; (2)  
11 trade advertising; (3) consumer advertising  
12 (4) promotions. The Court finds that these  
13 constitute 'speech' for the purposes of  
14 analysis. Plaintiffs cite *Pelts & Skins, LLC*  
15 *v. Landreneau, supra*, 365 F.3d at 434:  
16 We recognize that, unlike the assessments at  
17 issue in *United Foods, Cochran, and Delano*  
18 *Farms*, a majority of the alligator-related  
19 assessments fund programs other than generic  
20 marketing ... In each of the past several  
21 years, the Council has spent approximately  
22 15% of the Resource Fund on generic marketing  
23 and the remainder on research and law  
24 enforcement. This distinction in the  
25 percentage of fees that go to generic  
26 marketing does not support applying *Glickman*  
to this case. The key element in *Glickman* -  
a highly collectivized marketing association  
- is still absent. The common thread uniting  
*Abood, Keller, Glickman, and United Foods* is  
that compelled subsidization of speech is  
permissible when individuals have been bound  
into a collective association ... The fees  
imposed here, though used for more than  
generic marketing, represent a collective  
association only in the loosest sense of that  
term.

20 Facially admissible evidence establishes greater industry  
21 collectivization than Plaintiffs' acknowledge. Plaintiffs point  
22 to every minute fact describing the Commission's activities and  
23 characterize each as speech. The undisputed facts show that more  
24 than 60% of the Commission's activities do not involve speech or  
25 expressive activity.

26 Plaintiffs' motion for partial summary judgment that *United*



1 *Foods* rather than *Glickman* applies to the Commission's statutory  
2 program is DENIED.

3 I. ABOOD'S "GERMANENESS" TEST.

4 If *Johanns* does not apply, the Commission moves for summary  
5 judgment that the Ketchum Act is constitutional under the  
6 "germaneness" test articulated in *Abood v. Detroit Board of*  
7 *Education, supra*, 431 U.S. 209. The Commission asserts that,  
8 even if the Ketchum Act is found to implicate the First  
9 Amendment, the Ketchum Act is constitutional under the  
10 "germaneness" test because the Commission's "advertising is  
11 germane to a broader program that serves important governmental  
12 interests and that is not related solely to speech."

13 1. Applicability of Test.

14 The Commission argues that *Glickman* and *United Foods* "make  
15 clear that compelled funding of generic advertising undertaken by  
16 a commodity research and promotion program is constitutional  
17 under the *Abood* germaneness test if the advertising is germane to  
18 a broader program that serves an important governmental interest  
19 and that is broader than the advertising itself." Plaintiffs  
20 respond that the Commission "erroneously conflates the *Abood*  
21 'germaneness' test with *Glickman*, when the analysis must be under  
22 *United Foods*." Plaintiffs contend:

23 The Commission substantially errs in claiming  
24 that its advertising program is germane to a  
25 'broader program that serves important  
26 governmental interests and that is not solely  
related to speech.' First of all, 'solely'  
is not to be found in *United Foods* nor in  
*Delano Farms*; instead those two cases held

1           when the program is not a collectivized  
2           regulatory program, and when the principle  
3           object of the program is speech the program  
4           is unconstitutional.

5           The Commission rejoins that Plaintiffs misread *Glickman*.  
6           First, the Supreme Court concluded that the generic advertising  
7           program at issue in *Glickman* did not implicate the First  
8           Amendment, 521 U.S. at 469-470, 474-476, but that, even if the  
9           marketing orders did implicate the First Amendment, they were  
10          constitutional under *Abood*'s "germaneness" test, 521 U.S. at 473.  
11          Second, *United Foods* held that the First Amendment was implicated  
12          because the mushroom industry was not "collectivized" as the tree  
13          fruit industry was in *Glickman*. The Supreme Court then  
14          considered the mushroom program under the *Abood* test, and  
15          concluded that "[t]he cooperative marketing structure relied upon  
16          by the majority of the Court in *Glickman* to sustain an ancillary  
17          assessment finds no corollary here; the expression respondent is  
18          required to support is not germane to a purpose related to an  
19          association independent from the speech itself; and the rationale  
20          of *Abood* extends to the party who objects to the compelled  
21          support for this speech." 533 U.S. at 415. The Commission  
22          replies:

23               Plaintiffs' contention that the challenged  
24               speech must be germane to a regulatory  
25               scheme, not just a broader program of  
26               activity, is flatly inconsistent with *Abood*  
                itself. In *Abood*, the Court did not consider  
                whether the challenged speech was germane to  
                regulations of the sort at issue in  
                [*Glickman*] - regulations that constrain the  
                entities being required to fund the  
                challenged speech. Rather, the Court

1           considered whether the challenged speech was  
2           germane to another union activity, collective  
3           bargaining. See 431 U.S. at 235-236.  
4           Similarly, in *United Foods*, the Court held  
5           that *Abood's* germaneness test could not be  
6           satisfied because the test requires 'an  
7           associational purpose' distinct from the  
8           challenged speech of a program - the  
9           challenged speech cannot be 'germane to  
10          itself.' 533 U.S. at 413, 415. Nothing  
11          about this rationale requires the broader  
12          program to which the challenged speech must  
13          be germane to price, quantity, quality, or  
14          packaging regulations [sic].

15           The Commission's interpretation of the *Abood* test is correct  
16          as the Commission's purpose is economic enhancement of the table  
17          grape industry, consumer protection from enhanced research and  
18          development of new varieties of grapes, and facilitating the  
19          entry into and expansion of domestic and international markets  
20          for table grapes.

## 21           2. Satisfaction of Germaneness Test.

22           The Commission argues that the Ketchum Act is constitutional  
23          under the germaneness test because: (1) it created a broad  
24          industry program, of which advertising is just one part, that  
25          serves California's important legislatively declared economic  
26          interest in expanding demand for California table grapes; and (2)  
27          the Commission's advertising is germane to that broader program  
28          and interest.

### 29           a. Broad Program.

30           The Commission suggests that the Ketchum Act serves  
31          primarily an economic purpose of expanding demand for California  
32          table grapes worldwide, thereby strengthening California's

1 economy and improving the health and welfare of its citizens.  
2 The Commission contends that the Ketchum Act's purpose is related  
3 principally to economic public welfare, not speech, and that  
4 California's interests in strengthening its economy and improving  
5 the welfare and health of its citizens are indisputably  
6 important.

7 To support its contention that the program enacted by the  
8 Ketchum Act is much broader than advertising, the Commission  
9 references Cal.Food & Agric. Code § 65572, which empowers the  
10 Commission in pertinent part:

11 (h) To promote the sale of fresh grapes by  
12 advertising and other similar means for the  
13 purpose of maintaining and expanding present  
14 markets and creating new and larger  
15 intrastate, interstate and foreign markets  
16 for fresh grapes; to educate and instruct the  
17 public with respect to fresh grapes; and the  
18 uses and times to use the several varieties,  
19 and the healthful properties and dietetic  
20 value of fresh grapes.

21 (i) In the discretion of the commission, to  
22 educate and instruct the wholesale and retail  
23 trade with respect to proper methods of  
24 handling and selling fresh grapes; to arrange  
25 for the performance of dealer service work  
26 providing display and other promotional  
materials; to make market surveys and  
analyses; and to present facts to and  
negotiate with state, federal and foreign  
agencies on matters which affect the  
marketing and distribution of fresh grapes;  
and to undertake any other similar activities  
which the commission may determine  
appropriate for the maintenance and expansion  
of present markets and the creation of new  
and larger markets for fresh grapes.

(j) In the discretion of the commission, to  
make in the name of the commission contracts  
to render service in formulating and

1 conducting plans and programs, and such other  
2 contracts or agreements as the commission may  
3 deem necessary for the promotion and sale of  
4 fresh grapes.

5 (k) In the discretion of the commission, to  
6 conduct, and contract with others to conduct,  
7 scientific research, including the study,  
8 analysis, dissemination and accumulation of  
9 information obtained from such research or  
10 elsewhere respecting the marketing and  
11 distribution of fresh grapes, the production,  
12 storage, refrigeration, inspection and  
13 transportation thereof, to develop and  
14 discover the dietetic value of fresh grapes  
15 and to develop and expand markets, and to  
16 improve cultural practices and product  
17 handling so that the various varieties may be  
18 placed in the hands of the ultimate consumer  
19 in the best possible condition. In  
20 connection with such research, the commission  
21 shall have the power to accept contributions  
22 of, or to match, private, state or federal  
23 funds that may be available for these  
24 purposes, and to employ or make contributions  
25 of funds to other persons or state or federal  
26 agencies conducting such research.

...

(m) In the discretion of the commission, to  
publish and distribute without charge a  
bulletin or other communication for  
dissemination of information relating to the  
fresh grape industry to producers and  
shippers.

Referring to evidence submitted in support of its motion for  
summary judgment, the Commission describes the various programs  
it has effectuated, *i.e.*, research, trade management, issues  
management, and education and outreach.

As to research, the Commission cites the Undisputed  
Stipulated Facts that it directs and oversees the funding, and  
provides direction in the implementation of viticulture research

1 performed by scientists from research institutions such as the  
2 University of California, California State University, and the  
3 USDA, designed to increase grower efficiency and improve grape  
4 production and fruit quality, and resulting in creation of new  
5 varieties that account for approximately 45% of the California  
6 table grapes shipped to market. Evidence demonstrates additional  
7 research is conducted related to category management and consumer  
8 preference, which provides retailers with information about the  
9 value of selling California table grapes and how to increase  
10 sales, and with consumer research and data showing how an  
11 individual retailer's sales of table grapes compare to sales by  
12 comparable retailers. The Commission also conducts research on  
13 international topics, such as production studies of foreign  
14 countries, transshipments, and consumer research. The Commission  
15 conducts a phytonutrient research program that analyzes the  
16 health benefits of table grapes, and has discovered links between  
17 the compounds in table grapes and the fighting or prevention of  
18 cancer, heart disease and degenerative nerve damage.

19 Plaintiffs respond that the research conducted by the  
20 Commission is less than 10% of its total budget based on the  
21 Commission's budgets for crop years 1994-1995 to the present.  
22 Referring to Section 65572(k), Plaintiffs assert that the  
23 Commission is required to disseminate its research results and  
24 does so. Plaintiffs argue that research "is akin to gathering  
25 the news and gathering the news is only relevant if the  
26 information is disseminated and all is in the process of 'speech'

1 or the press likewise protected by the First Amendment." In so  
2 arguing, Plaintiffs cite *Keyishian v. Board of Regents of*  
3 *University of State of N.Y.*, 385 U.S. 589, 603 (1967) ("[Academic]  
4 freedom is ... a special concern of the First Amendment, which  
5 does not tolerate laws that cast a pall of orthodoxy over the  
6 classroom"); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250  
7 (1957) ("Teachers and students must always remain free to inquire,  
8 to study and to evaluate, to gain new maturity and understanding;  
9 otherwise our civilization will stagnate and die"); *CBS, Inc. v.*  
10 *Smith*,, 681 F.Supp. 794, 802-803 (S.D.Fla.1988) ("The gathering of  
11 news of political consequence is a necessary corollary to the  
12 freedom to report about politics and government ... Simply put,  
13 newsgathering is a basic right protected by the First Amendment;  
14 'without some protection for seeking out the news, freedom of the  
15 press could be eviscerated.'"). Plaintiffs argue that research  
16 is "worthless" without dissemination. Further, the Commission's  
17 research activities dealing with category management, consumer  
18 preference, and the health benefits of table grapes all "involve  
19 essential elements of speech because the information is provided  
20 to producers, shippers and ... retailers."

21 The Commission responds that its 2004-2005 research  
22 activities accounted for 22% of its total expenditures and that  
23 Plaintiffs unsupported conclusion that research is always less  
24 than 10% of the Commission's budget is wrong in the face of the  
25 undisputed evidence submitted by the Commission. The Commission  
26 asserts that its research activities are not "speech", citing

1 *United States v. Frame*, 885 F.2d 1119, 1131 (3d Cir.), *cert.*  
2 *denied*, 493 U.S. 1094 (1989) ("[T]he aspect of the Beef Promotion  
3 Act which imposes assessments for research purposes qualifies as  
4 neither 'expressive' nor 'intimate' association, and therefore  
5 does not implicate Frame's first amendment rights"). The  
6 Commission argues that "[e]ven if Plaintiffs were right that the  
7 dissemination of research results implicates the First Amendment  
8 - which is not the case - the research itself nevertheless would  
9 not implicate the 'compelled subsidy' doctrine.

10 For trade management, the Commission points to evidence of  
11 its efforts to increase sales of table grapes to domestic and  
12 international wholesalers. Domestically, the Commission works  
13 with retailers to increase the quantity of table grapes sold  
14 during the season; to increase the square footage of table grape  
15 display space and the number of varieties displayed; to improve  
16 the effectiveness of these displays; and to increase the number  
17 and effectiveness of table grape advertisements run by the  
18 retailers, including providing training to retailers' produce  
19 staff for handling, storing and displaying table grapes. The  
20 Commission enters into promotional incentive agreements with  
21 wholesalers and retailers by which the Commission agrees to  
22 provide goods and services to a retailer if the retailer meets a  
23 target for total grape sales volume. The Commission encourages  
24 foodservice providers to increase their purchases of table grapes  
25 by developing recipes that it sends to foodservice providers; by  
26 contacting editors and writers of foodservice publications; and



1 by retaining a registered dietitian as a consultant.

2 In international trade management activities, the Commission  
3 has fifteen overseas representatives, who work directly with  
4 overseas retailers, importers and wholesalers, to provide grape  
5 storage, handling, and display information and monitor local  
6 markets in order to provide information that is sent twice a  
7 month during the California season to California table grape  
8 grower/shippers. The overseas' representatives also organize  
9 activities such as in-store grape tastings and cooking  
10 demonstrations, and provide financial awards to retailers for  
11 grape promotional activities.

12 Plaintiffs argue that all the Commission's trade management  
13 are "all speech":

14 The way to discern whether this is speech, is  
15 to look at it from the standpoint of  
16 Plaintiffs or any shippers or any service  
17 providers or any retailer engaging in the  
18 same conduct; that is what the Commission  
19 does, if done by a private person, would  
20 absolutely be protected by the First  
21 Amendment. Since it would be protected by  
22 the First Amendment if private persons (such  
23 as Plaintiffs) engaged in that conduct, the  
24 First Amendment bars Plaintiffs being  
25 compelled to fund others doing it.

26 The Commission replies that its trade management activities  
"may involve people speaking, but none of it consists of public  
dissemination of messages to which Plaintiffs object." The  
Commission is correct as the purpose of trade management is to  
assure enhanced and effective world-wide distribution, compliance  
with regulatory requirements of world-wide markets to assure

1 access and participation, and remedial actions to address  
2 quarantine, embargos, and other governmental impediments to  
3 continued access into and participation in new and existing  
4 markets.

5 The Commission refers issues management, which entails the  
6 Commission's work with interested parties and decisionmakers to  
7 keep trade flowing in the United States and internationally and  
8 to respond to issues that could impair the distribution of  
9 California table grapes and the economic strength of the  
10 industry. The Commission asserts that a significant portion of  
11 this work is related to gaining and maintaining access to  
12 international markets. The Commission's evidence shows that it  
13 sponsored research and worked with the USDA and the Office of the  
14 U.S. Trade Representative (USTR) to negotiate and implement a  
15 shipping protocol with Australia that called for grapes to be  
16 inspected and fumigated; that it has helped to open markets for  
17 California table grapes in China and India; that it helped to  
18 keep the market in the United Kingdom open when U.K. retailers  
19 threatened to stop importation of California table grapes in 2002  
20 following the discovery of a black widow spider in a shipment;  
21 and that it helped reverse a 2004 announcement by Thailand  
22 effectively banning three chemical by setting a zero tolerance on  
23 them, preventing the importation of California table grapes. The  
24 Commission also refers to evidence that it works with USDA and  
25 USTR to lower tariff and non-tariff barriers that impede the  
26 importation of California table grapes and that it has opened or

1 improved access to California table grapes in a number of  
2 countries or regions.

3 The Commission describes its issue management work related  
4 to pesticides, pest exclusion, production, packaging,  
5 distribution and quarantine, such as monitoring chemical Maximum  
6 Residue Level restrictions to determine whether the MRL affects  
7 California table grapes, whether the proposed MRL is lower than  
8 U.S. or international standards, and whether the proposed MRL  
9 will disrupt shipments of California table grapes to the country  
10 in question. The Commission explains its patenting and licensing  
11 program pursuant to which the Commission has developed new  
12 varieties jointly with the USDA and licensed newly patented  
13 varieties, applied for intellectual property protection abroad,  
14 set the terms on which new varieties are available abroad, and  
15 enforced foreign intellectual property rights obtained.

16 Plaintiffs argue that all of the categories of activities  
17 identified as issues management, if done by a private person,  
18 would be fully protected by the First Amendment and "all fall  
19 within the category of 'speech' subject to *United Foods* and the  
20 *Delano Farms* Ninth Circuit decision." This characterization is  
21 overbroad and unfair. The activities described may require  
22 communication, but not to advertise or promote, rather to address  
23 scientific and regulatory concerns.

24 On the subject of education and outreach, the Commission's  
25 evidence shows that it provides education, training, analysis,  
26 and general information relating to California table grapes to

1 retailers, wholesales, foodservice providers, grower/shippers,  
2 researchers, consumers, teachers, editors, authors, doctors and  
3 nutritionists.

4 Plaintiffs interpose the same argument, "that since neither  
5 the State nor Congress could prohibit Plaintiff [sic] from doing  
6 the same activity because it involves speech, it falls within the  
7 umbrella of *United Foods* ... that precludes compelled funding of  
8 the same activities."

9 The Commission responds that its evidence establishes that  
10 of its broad range of activities, only one is advertising, and  
11 the others enhance demand for California table grapes, strengthen  
12 California's economy, and improve the health and welfare of its  
13 citizens. For the 2004-2005 fiscal year, the four categories,  
14 i.e., research, trade management, issues management, and  
15 education and outreach, accounted for the following percentages  
16 of the Commission's expenditures of assessments: 22% on research,  
17 24% on trade management, 18% on issues management, and 10% on  
18 education and outreach. From this evidence it is evident that  
19 advertising has never been "almost all" of the Commission's  
20 program, in contrast to *United Foods*, *supra*, 533 U.S. at 412,  
21 where "almost all of the funds collected under the mandatory  
22 assessments are for one purpose: generic advertising". The  
23 Commission contends that it is "just the sort of broad economic  
24 program to which *Abood's* germaneness analysis applies."

25 Plaintiffs cite *Pelts & Skins, LLC v. Landreneau*, *supra*, 365  
26 F.3d at 434 and *Michigan Pork Producers Ass'n., Inc. v. Veneman*,

1 *supra*, 348 F.3d at 163 to argue that the Commission's research,  
2 trade management, issues management and education and outreach  
3 activities are "all speech related programs, not the regulatory  
4 programs that have collectivized the industry or required the  
5 compelled association for non-speech related regulatory programs  
6 that *United Foods* ... would countenance." As stated above, these  
7 Circuit Court opinions no longer constitute valid authority, but  
8 more importantly Plaintiffs' characterization of every Commission  
9 activity as speech is nothing more than argumentative legal  
10 conclusions, not supported by the facts.

11 Plaintiff also cite *In re Washington State Apple Advertising*  
12 *Com'n*, *supra*, 257 F.Supp.2d at 1302:

13 Like *United Foods*, the Apple Commission's  
14 essential purpose is the advertisements and  
15 other marketing which it produces. In the  
16 years 1998-99 through 2001-02, the Commission  
17 spent between 62.5% of 85% of its budget  
18 expenditures were spent on 'marketing'  
19 activities ... Those same spreadsheets  
20 reflect that while not all of that budget is  
21 allocated to 'consumer advertising,' the vast  
22 majority of 'marketing' expenditures fits  
23 within four categories: (1) publications; (2)  
24 trade advertising; (3) consumer advertising  
25 (4) promotions. The Court finds that these  
26 constitute 'speech' for the purposes of  
analysis.

21 The Commission argues the District Court opinion is  
22 unsupported by analysis and strays "from the proposition that a  
23 'compelled subsidy' claims looks only to any publically  
24 disseminated message with which the plaintiffs disagree."  
25 The Commission cites *Johanns*, 544 U.S. at 557 ("[t]he reasoning  
26 of these compelled-speech cases has been carried over to certain

1 instances in which individuals are compelled not to speak, but to  
2 subsidize a private message with which they disagree"), and  
3 interprets the Supreme Court holding that the First Amendment  
4 applies only in this context if the plaintiff actually objects to  
5 a message he is compelled to fund and it is not enough that a  
6 party object to funding an organization on the ground that free  
7 competition is preferable to socialism or that the organization  
8 does not use the funds effectively. The Commission argues that  
9 Plaintiffs do not object to any message conveyed by the  
10 overwhelming majority of the Commission's work nor do many of the  
11 Commission's activities convey any particular message to which  
12 Plaintiffs might possibly object. The Commission refers to  
13 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547  
14 U.S. 47 (2006), that upheld a federal statute which required the  
15 Department of Defense to deny federal funding of colleges and  
16 universities that prohibited military representatives access to  
17 and assistance for recruiting purposes. A portion of the opinion  
18 addressed the argument that the statute constituted "compelled  
19 speech" because recruiting assistants provided by the schools  
20 often sent e-mails or posted notices on bulletin boards:  
21 "Compelling a law school that sends scheduling e-mails for other  
22 recruiters to send one for a military recruiter is simply not the  
23 same as forcing a student to pledge allegiance, or forcing a  
24 Jehovah's Witness to display the motto 'Live Free or Die,' and it  
25 trivializes the freedom protected by *Barnette* and *Wooley* to  
26 suggest that it is." 547 U.S. at 62.

1       The Commission also offers *Lehnert v. Ferris Faculty Ass'n*,  
2       500 U.S. 507, 529 (1991) ("[P]ublic speech in support of the  
3       teaching profession generally is not sufficiently related to the  
4       union's collective bargaining functions to justify compelling  
5       dissenting employees to support it), as establishing that  
6       compelled funding of speech implicates the First Amendment only  
7       if it involves dissemination of a message. The Commission  
8       argues:

9               Drawing a distinction between speech that is  
10              publicly disseminated and conveys a  
11              particular message to which a party might  
12              possibly object - like generic advertising -  
13              and non-public speech or speech with no  
14              particular message to which a party might  
15              possibly object makes perfect sense.  
16              Plaintiffs' theory - that they cannot be  
17              compelled to fund any activity that involves  
18              the spoken (or written) word - cannot be the  
19              law. As the Supreme Court has noted in  
20              rejecting a freedom of association challenge  
21              to a law restricting access to dance halls,  
22              '[i]t is possible to find some kernel of  
23              expression in almost every activity a person  
24              undertakes - for example, walking down the  
25              street or meeting one's friends at a shopping  
26              mall - but such a kernel is not sufficient to  
             bring the activity within the protection of  
             the First Amendment.' *City of Dallas v.*  
             *Stanglin*, 490 U.S. 19, 25 (1989). Every  
             activity a union or agricultural commission  
             might engage in likely involves some person  
             uttering some word - like a grape breeder  
             giving instructions to her assistant - yet  
             the Supreme Court in *Abood*, [*Glickman*], and  
             *United Foods* did not hold that the funding of  
             every activity potentially implicates the  
             First Amendment. Under Plaintiffs' view, a  
             law imposing a toll for crossing the Golden  
             Gate Bridge would violate the First Amendment  
             if a portion of the toll proceeds paid toll  
             collectors who must speak to motorists.

26       The Commission concludes that its "non-advertising activities

1 form the broader, constitutionally permissible, program to which  
2 the Commission's advertising can be germane." The evidence  
3 establishes that advertising was only 25% of the Commission's  
4 expenditures in 2004-2005 and has never been more than 50% of the  
5 assessment expenditures during the relevant time period.

6 The totality of the circumstances of the Commission's  
7 industry activities are germane within the meaning of *Abood* to  
8 achieving the legislatively adopted economic objectives.

9 b. Germane to Commission's Broad Program.

10 The Commission asserts it is entitled to summary judgment  
11 that its generic advertising is germane to the Commission's  
12 broader demand-enhancement program under the *Abood* test, because  
13 all of its advertisements are designed to motivate consumers to  
14 buy more fresh California table grapes; that its advertisements  
15 have not promoted products other than California table grapes;  
16 that the Commission has not run political or ideological  
17 advertisements; that its advertisements have been in good taste  
18 and are not false or misleading; and that its advertisement have  
19 increased demand for California table grapes, which benefits the  
20 table grape industry, the California economy, and the health and  
21 welfare of its citizens. Finally, this advertising works in  
22 conjunction with its other non-speech activities, including the  
23 current advertising campaign that emphasizes grapes as a healthy  
24 snack alternative.

25 The totality to the circumstances of the Commission's  
26 industry program are germane within the meaning of *Abood* to



1 achieving the legislatively adopted economic objectives to  
2 advance, enhance, and protect the table grape industry and the  
3 greater economic well-being of California.

4 The Commission's motion for summary judgment that the  
5 Ketchum Act is constitutional under the "germaneness" test  
6 articulated in *Abood* is GRANTED.

7 J. CONCLUSION.

8 For the reasons stated above:

9 1. Plaintiffs' motion for partial summary judgment is  
10 DENIED and the Commission's motion for summary judgment is  
11 GRANTED that the Table Grape Commission is a governmental entity  
12 that engages in government speech within the meaning of *Johanns*  
13 *v. Livestock Marketing Ass'n.*, 544 U.S. 550 (2005);

14 2. Plaintiffs' motion for partial summary judgment is  
15 DENIED that the Table Grape Commission is governed by *United*  
16 *Foods, Inc. v. United States*, 533 U.S. 405 (2001);

17 3. Plaintiffs' motion for partial summary judgment is  
18 GRANTED that the *Central Hudson* test, *Central Hudson Gas &*  
19 *Electric Corp. v. Public Service Commission of New York*, 447 U.S.  
20 557 (1980), has no application to the resolution of Plaintiffs'  
21 First Amendment challenge to the Ketchum Act, and the  
22 Commission's motion for summary judgment is DENIED;

23 4. The Commission's motion for summary judgment is GRANTED  
24 that its activities are germane to valid legislative objectives  
25 within the meaning of *Abood v. Detroit Board of Education*, 431  
26 U.S. 209 (1977);

1           5. The Commission's motion for partial summary judgment on  
2 the grounds that The Susan Neill Company lacks standing to obtain  
3 relief and the Lucas Brothers Partnership lacks standing to  
4 obtain prospective as opposed to past relief is GRANTED and  
5 Defendant's motion for summary judgment on this issue is DENIED.

6           6. Counsel for the Commission shall prepare and lodge a  
7 form of order setting consistent with this Memorandum Decision  
8 within five (5) days following the date of service of this  
9 decision.

10           IT IS SO ORDERED.

11           Dated: March 28, 2008

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE